Supreme Court, U.S.
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No. 10-772

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In The
Supreme Court of the United States

THE CITY OF HAZLETON, PENNSYLVANIA,

Petitioner,

v.

PEDRO LOZANO, HUMBERTO HERNANDEZ, ROSA LECHUGA, JOHN DOE 1, JOHN DOE 2, JOHN DOE 3, A MINOR, BY HIS PARENTS, JANE DOE 1, JANE DOE 2, JANE DOE 3, JOHN DOE 4, A MINOR, BY HIS PARENTS, BRENDA LEE MIELES, CASA DOMINICANA OF HAZLETON, INC., HAZLETON HISPANIC BUSINESS ASSOCIATION, PENNSYLVANIA STATEWIDE LATINO COALITION, JANE DOE 5, JOHN DOE 7, JOSE LUIS LECHUGA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETTION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the provisions of a Hazleton, Pennsylvania, ordinance that encourage employers to utilize the federal E-Verify program to verify employees' work authorization and suspend the business licenses of those employers who have been found to have hired unauthorized aliens are impliedly preempted by federal immigration laws.

2. Whether the provisions of a Hazleton, Pennsylvania, ordinance that prohibit landlords from harboring illegal aliens by knowingly renting apartments to them are impliedly preempted by federal immigration laws.

3. Whether knowingly renting an apartment to an illegal alien constitutes harboring an illegal alien under 8 U.S.C. § 1324(a)(1)(A).

PARTIES TO THE PROCEEDING

All parties are named in the caption above. Petitioner who was defendant/appellant below is the City of Hazleton, Pennsylvania.

Respondents who were plaintiffs/appellees below are: Pedro Lozano, Humberto Hernandez, Rosa Lechuga, John Doe 1, John Doe 2, John Doe 3, a Minor by His Parents, Brenda Lee Mieles, Casa Dominicana of Hazleton, Inc., Hazleton Hispanic Business Association, Pennsylvania Statewide Latino Coalition, Jane Doe 5, John Doe 7, and Jose Luis Lechuga.

RULE 29.6 STATEMENT

The Petitioner is a Pennsylvania municipality. There are no parent corporations or publicly-held corporations that own stock in the Petitioner.

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OPINIONS BELOW

The opinion of the United States District Court for the Middle District of Pennsylvania is published at 496 F. Supp. 2d 477 (M.D. Pa. 2007) and reproduced below at App. 159-349. The opinion of the Third Circuit is published at 600 F.3d 170, and reproduced below at App. 1-158.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit, affirming the judgment of the United States District Court for the Middle District of Pennsylvania, was entered on September 9, 2010. This Court possesses jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Federal Constitutional and Statutory Provisions

United States Constitution, Article VI (Supremacy Clause)

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall

be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

8 U.S.C. § 1324(a)(1)(A)

(a) Criminal penalties

(1)(A) Any person who –

(i) knowing that a person is an alien, brings to or attempts to bring to the United States in any manner whatsoever such person at a place other than a designated port of entry or place other than as designated by the Commissioner, regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States and regardless of any future official action which may be taken with respect to such alien;

(ii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law;

(iii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any

place, including any building or any means of transportation;

(iv) encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law; or

(v)(I) engages in any conspiracy to commit any of the preceding acts, or

(v)(II) aids or abets the commission of any of the preceding acts,

shall be punished as provided in subparagraph (B).

8 U.S.C. § 1324a(a)(1)-(2)

(a) Making employment of unauthorized aliens unlawful

(1) In general

It is unlawful for a person or other entity –

(A) to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3) of this section) with respect to such employment, or

(B)(i) to hire for employment in the United States an individual without complying with the requirements of subsection (b) of this section or (ii) if the person or entity is an agricultural association, agricultural employer,

or farm labor contractor (as defined in section 1802 of Title 29), to hire, or to recruit or refer for a fee, for employment in the United States an individual without complying with the requirements of subsection (b) of this section.

(2) Continuing employment

It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.

8 U.S.C. § 1324a(h)(2)

Preemption

The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.

8 U.S.C. § 1373

(a) In general

Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and

Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

(b) Additional authority of Government entities

Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:

(1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.

(2) Maintaining such information.

(3) Exchanging such information with any other Federal, State, or local government entity.

(c) Obligation to respond to inquiries

The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.

8 U.S.C. § 1644

> Notwithstanding any other provision of Federal, State, or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States.

Local Ordinances

Hazleton, Pennsylvania, Illegal Immigration Relief Act Ordinance (IIRAO) (Ordinance 2006-18, as amended by Ordinances 2006-40 and 2007-7)

See App. 350-368.

Hazleton, Pennsylvania, Rental Registration Ordinance (RO) (Ordinance 2006-13)

See App. 369-388.

INTRODUCTION

This case involves a question of great national importance: whether states and municipalities may take limited steps to assist the federal government in returning rule of law to immigration. This Court has long made clear that states and municipalities may enact laws that are in harmony with federal law in order to discourage illegal immigration. "Respondents ... fail to point out, and an independent review does

not reveal, any specific indication in either the wording or the legislative history of the INA that Congress intended to preclude even harmonious state regulation touching on aliens in general, or the employment of illegal aliens in particular." *De Canas v. Bica*, 424 U.S. 351, 358 (1976). However, the holding of the Third Circuit in the instant case directly challenges this Court's holdings on the subject.

Numerous states and municipalities have taken steps to assist the federal government in immigration enforcement and to reduce the mounting fiscal and criminal burdens imposed by illegal immigration in their jurisdictions. In the first six months of 2010, 44 state legislatures passed a total of 191 immigration-related laws and adopted a total of 128 resolutions on the subject. Five bills were vetoed, for a total of 314 enacted laws and resolutions – a 21 percent increase over 2009.[1] Such laws have faced lawsuits proposing a variety of implied preemption challenges. Numerous cases are currently pending before federal district and circuit courts, which would benefit greatly from guidance by this Court. See, *e.g.*, *Keller v. Fremont* (D. Neb. Case Nos. 8:10-cv-00270 and 4:10-cv-3140 filed July 21, 2010); *Villas at Parkside Partners v. Farmers Branch*, 701 F. Supp. 2d 835 (N.D. Tex. 2010), appeal pending (5th Cir. Case No. 10-10751); *Robert Stewart, Inc. v. Cherokee County* (N.D. Ga. Case No. 07-cv-0015 filed Jan. 4, 2007);

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[1] Nat'l Conf. of State Legislatures, *2010 Immigration-Related Bills and Resolutions in the States, January-June 2010* (July 20, 2010), at http://www.ncsl.org/default.aspx?TabId=20881.

Chamber of Commerce v. Edmondson, 594 F.3d 742 (10th Cir. 2010), pending before district court (W.D. Okla. Case No. CIV-08-109-C).

This case concerns implied preemption challenges to ordinances enacted by Hazleton, Pennsylvania, to prevent the employment of unauthorized aliens by employers and to prevent the harboring of illegal aliens by landlords. Hazleton's ordinances match the terms and classifications of federal immigration law and require officials to defer to federal determinations of aliens' immigration statuses under 8 U.S.C. § 1373(c). In drafting the ordinances, the City made every effort to avoid any conflict with federal immigration laws.

This case offers a particularly useful vehicle for this Court to provide guidance to the lower courts because it involves circuit splits on three different questions. Only one of the three questions – the relatively narrow issue of whether E-Verify participation may be made mandatory – is squarely presented in the immigration preemption case currently before this Court, *Chamber of Commerce v. Whiting* (Case No. 09-115). The remaining questions – whether implied preemption can occur through disruption of implicit congressional balances, and whether knowingly renting an apartment to an illegal alien constitutes harboring – must also be addressed if states and municipalities are to have meaningful guidance that is relevant to the majority of legislative enactments that they are considering.

If the petition is not granted, two pronounced circuit splits would continue to generate uncertainty among the lower courts. In addition, a decision of the Third Circuit that directly contradicts this Court's field preemption holding in *De Canas*, 424 U.S. at 356-358, would be allowed to stand without review. Moreover, a holding in the Third Circuit's decision would remain in place even though it is likely to be in direct conflict with a nearly-contemporaneous decision of the Supreme Court. For these reasons and because of the national importance of the issues presented, review by this Court is necessary.

STATEMENT OF THE CASE

Hazleton is a Pennsylvania city of the third class that experienced a rapid increase in population during 2001-06, from approximately 23,000 to 30,000-33,000 residents, due in part to a significant influx of illegal aliens. Hazleton derives the majority of its tax revenues from a local income tax. However, the population increase was not accompanied by additional income tax revenues, because many of the new arrivals worked "off the books." Consequently, the influx of illegal aliens overloaded the City's budget. In addition to the fiscal costs, illegal aliens committed numerous crimes in Hazleton, including murder. In June 2006, the Mayor and City Council decided to exercise their authority, consistent with federal law, to take limited steps to discourage the employment and harboring of illegal aliens. They enacted two ordinances, described below.

I. The Rental Registration Ordinance

Ordinance 2006-13, the "Rental Registration Ordinance" ("RO") was enacted primarily to address increasing problems with overcrowded apartments. It requires any landlord to obtain a permit prior to allowing occupancy of a dwelling unit. RO § 6.a, App. 379-380. It also requires any tenant to provide basic identity and contact information to the City in order to obtain an occupancy permit. *Id*. The City does not attempt to confirm any information received from tenants at that time. Occupancy permits are issued to all applicants, regardless of the information or documents presented. RO § 6.c, App. 380. The RO merely facilitates the collection of information that may be used later for code enforcement purposes, security purposes, or for the purpose of investigating a complaint under the harboring provisions of the IIRAO.

II. The Illegal Immigration Relief Act Ordinance

Ordinance 2006-18, as later amended by Ordinances 2006-40 and 2007-6 (collectively the "Illegal Immigration Relief Act" or "IIRAO"), revokes the business license of any business entity that knowingly employs unauthorized aliens, as that term is defined by federal law. IIRAO § 4.A-B, App. 354-357. The IIRAO applies federal definitions of immigration status and federal standards of work authorization. IIRAO §§ 3.E, 3.G, 4.B(3), 6.A, App.

353-355, 363. The Ordinance relies on the federal government's verification of a person's work authorization, pursuant to 8 U.S.C. § 1373(c). IIRAO § 4.B(3), App. 355. The IIRAO does not permit any Hazleton official to "attempt to make an independent determination of any alien's legal status, without verification from the federal government." IIRAO § 7.E, App. 366-367. Employers that use the federal government's E-Verify Program (formerly "Basic Pilot Program") to verify the work authorization of their employees are granted safe harbor against the loss of their business licenses. IIRAO § 4.B(5). App. 356.

The IIRAO also renders it unlawful to harbor an illegal alien by knowingly providing rental accommodations to an illegal alien. IIRAO § 5.A, App. 359-360. The IIRAO applies federal definitions of unlawful presence in the United States. IIRAO §§ 3.D, 6.A, App. 353, 363. The City relies on the federal government's verification of an alien's immigration status, according to the terms of 8 U.S.C. § 1373(c). IIRAO §§ 7.E, 7.G, App. 366-368. The City will use the Systematic Alien Verification for Entitlements (SAVE) internet-based system, to obtain such verifications from the federal government, unless the federal government directs the City to utilize another method of verification. App. 278.

On December 28, 2006, in an effort to clarify various aspects of Ordinance 2006-18, Hazleton enacted Ordinance 2006-40, the "Illegal Immigration Relief Act Implementation Amendment," which added

a final section to the IIRAO. Ordinance 2006-40 made clear that the IIRAO applied only prospectively and concerned only those employment contracts and lease contracts entered into after the Ordinance becomes effective. It also defined what actions constituted a correction of a violation, and allowed an employer or landlord to toll enforcement by seeking re-verification of an alien's status from the federal government. IIRAO §§ 7.A-E, App. 363-367. It also clarified that the Magisterial District Court of Hazleton is an available venue in which an employer, employee, landlord, or tenant may challenge the enforcement of the IIRAO. IIRAO, § 7.F, App. 367. On December 28, 2006, Hazleton enacted Ordinance 2006-35 to re-instate the old rental property registration system that existed prior to the RO, so that the prior system could operate while the RO was under litigation. Finally, on March 21, 2007, Hazleton enacted Ordinance 2007-6, which eliminated the words "solely and primarily" from §§ 4.B.2 and 5.B.2 of the IIRAO. App. 355, 360. It also added the word "knowingly" to § 4.A of Ordinance 2006-18. App. 354.

All references in this Petition to the "IIRAO" are to Ordinance 2006-18, as amended by Ordinances 2006-40 and 2007-6. The final text of the amended IIRAO is found at App. 350-368. The text of the RO is found at App. 369-388.

III. Procedural History

On October 30, 2006, Respondents, a group of landlords, tenants, employers, and employees in the City of Hazleton, brought a facial challenge against the IIRAO and the RO, seeking to enjoin the City from enforcing the Ordinances. On October 31, 2006, the United States District Court for the Middle District of Pennsylvania granted Respondents' request for a Temporary Restraining Order. The District Court exercised jurisdiction pursuant to 28 U.S.C. §§ 1331, 1367 and 2201. The Ordinances have never been implemented or enforced.

On January 12, 2007, Respondents filed a Second Amended Complaint seeking a permanent injunction of the IIRAO and the RO. On July 26, 2007, the District Court issued an opinion and on August 7, 2007, the District Court issued a final order granting a permanent injunction.

On August 23, 2007, Petitioner timely appealed the decision of the District Court to the Third Circuit of the United States Court of Appeals. On August 24, 2007, Petitioner filed a corrected Notice of Appeal. The Court of Appeals exercised jurisdiction pursuant to 28 U.S.C. § 1291. On September 9, 2010, the Third Circuit affirmed the decision of the District Court but differed in its reasoning. App. 4.

The Third Circuit held that the Respondents possessed standing to challenge the Ordinances generally, but did not have standing to challenge a severable private cause of action provision contained

within the IIRAO. App. 18-46. The Third Circuit also ruled that certain Respondents could proceed anonymously and that the confidentiality agreement between the parties did not violate 8 U.S.C. § 1373(a). App. 51-52. Petitioners are not seeking review of these jurisdictional and threshold holdings.

In addressing the merits of the case, the Third Circuit acknowledged that it presented a facial challenge but questioned whether the *Salerno* standard applied because this case presents a "quite different constitutional challenge" than the challenges in *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008), and *United States v. Salerno*, 481 U.S. 739 (1987). App. 69. Turning first to the employment provisions of the IIRAO, the Third Circuit held that a presumption against preemption applied because "employment of persons unauthorized to work in this country ... fall[s] within the state's historic police powers." App. 78. The Third Circuit held that the IIRAO was not a preempted "regulation of immigration." *Id.* The Third Circuit then held that the IIRAO's suspension of the business licenses of employers who employ unauthorized aliens was not expressly preempted because the IIRAO constitutes a "licensing [or] similar law[ ]" that is exempted from preemption under 8 U.S.C. § 1324a(h)(2). App. 84.

The Third Circuit instead found the employment provisions of the IIRAO to be conflict preempted. App. 87-109. The Court found two principal conflicts. First, the Court held that the provisions disrupt a

congressionally-struck balance between competing objectives. The Court held that Congress implicitly created a "careful balance" between deterring the employment of unauthorized aliens and preventing discrimination and minimizing burdens on employers. App. 88. The Third Circuit contended that the IIRAO upset this balance by placing too much emphasis on enforcement against employers who knowingly hire unauthorized aliens. App. 88-89. The Third Circuit rejected the reasoning of the Ninth Circuit that led that Court to reach the opposite conclusion on this issue. App. 106. Second, the Third Circuit held that the IIRAO "coerces use of E-Verify," which "contradict[s] congressional intent for E-Verify to remain fully voluntary for the vast majority of employers...." App. at 96-97. Here, too, the Third Circuit rejected the reasoning of the Ninth Circuit that led that Court to reach the opposite conclusion on the issue. App. 100-101.

In reviewing the harboring provisions of the IIRAO and RO, the Third Circuit declined to apply the presumption against preemption. App. 111. The Third Circuit held that field preemption had occurred and that the Ordinances intruded on the field by denying illegal aliens the opportunity to rent apartments in the City. App. 111-112. The Third Circuit reasoned that "in essence" Hazleton was attempting to regulate the residence of aliens in the United States by "ensuring that persons do not enter or remain in a locality." App. 112-113.

In addition, the Third Circuit held that the Ordinances were conflict preempted because "unlawful immigration status does not lead instantly, or inevitably, to removal[,]" and because the City could not precisely "predict" whether the federal government would "initiate proceedings against a particular alien." App. 115. The Third Circuit surmised that the federal government "tacitly allows the presence of some aliens whose technical status remains 'illegal.'" App. 115.

In reaching its conclusions that the harboring provisions of the Ordinances were preempted, the Third Circuit rejected Hazleton's argument that it was exercising concurrent enforcement authority and that the harboring of illegal aliens in apartments was already prohibited by 8 U.S.C. § 1324(a)(1)(A)(iii). The Third Circuit determined that Hazleton's definition of "harboring" was inconsistent with the Third Circuit's definition, even if Hazleton's definition was consistent with that of other Circuits. App. 118-119. Finally, the Third Circuit held that even if Hazleton's definition of harboring were correct, field preemption would still apply because the harboring provisions of the IIRAO "operate in a field which the federal government exclusively occupies." App. 117-118.

REASONS FOR GRANTING THE WRIT

I. Review is Warranted Because the Third Circuit's Conflict Preemption Holding That the IIRAO Disrupts a Supposed Congressional Balance Between Preventing Unauthorized Employment and Deterring Workplace Discrimination and Minimizing Employer Burdens Conflicts With Holdings of the Ninth Circuit and This Court.

A. The Third Circuit Has Created a Circuit Split with the Ninth Circuit.

The Third Circuit found the employment provisions of the IIRAO to be impliedly preempted under a theory that the IIRAO disrupted a "careful balance" created by Congress. App. 88. This supposed balance was between the competing objectives of preventing the employment of unauthorized aliens versus preventing discrimination in the workplace and minimizing burdens on employers. App. 88-89. Although this balance is nowhere mentioned in the text of federal law, the Third Circuit held that it was implicit in the structure of the Immigration Reform and Control Act (IRCA) of 1986, which prohibits the employment of unauthorized aliens, while at the same time prohibiting employment discrimination against alien workers.

The Third Circuit reasoned that the IIRAO disrupts this balance and is therefore conflict preempted:

> [I]t is indisputable that Congress went to considerable lengths in enacting IRCA to achieve a careful balance among its competing policy objectives of effectively deterring employment of unauthorized aliens, minimizing the resulting burden on employers, and protecting authorized aliens and citizens perceived as "foreign" from discrimination.... The [IIRAO] substantially undermines this careful balance. It furthers the first of these federal objectives at the expense of the others. This "significant conflict" is sufficient to rebut the presumption against preemption ... and invalidate these provisions under the Supremacy Clause.

App. 88-89 (internal citations omitted). The Third Circuit also reasoned that the IIRAO disrupted this congressional balance by "compelling businesses to concern themselves with the work authorization status of contractors." App. 102-103. And finally, the Third Circuit suggested that Hazleton could not rely on federal anti-discrimination laws to protect authorized alien workers, but had to create redundant local laws on the subject to preserve the balance. "Hazleton's failure to balance its sanctions with anti-discrimination protections is a final area in which the employment provisions of the IIRAO significantly conflict with IRCA." App. 104.

This holding is in direct conflict with a decision of the Ninth Circuit that is currently before this Court. *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856 (9th Cir. 2009), *cert. granted sub nom. Chamber*

of Commerce v. Candelaria, 130 S. Ct. 3498 (June 28, 2010), *renamed Chamber of Commerce v. Whiting* (Case No. 09-115). The Ninth Circuit considered and rejected the same conflict preemption claim:

> Appellants contend that conflict preemption is a concern here also because of the Act's potentially discriminatory effects. Their argument is that E-Verify increases discrimination against workers who look or sound "foreign," and that mandatory E-Verify usage thus upsets the enforcement/discrimination balance that Congress has maintained by keeping E-Verify optional. This argument fails because Congress requires employers to use either E-Verify or I-9, and appellants have not shown that E-Verify results in any greater discrimination than I-9.

Chicanos Por La Causa, 558 F.3d at 867. The Ninth Circuit also rejected the argument that the supposed congressional balance was disrupted by the potential sanction of the loss of a business license – the same sanction imposed by the IIRAO. As the Ninth Circuit explained, this argument "is essentially speculative, as no complaint has yet been filed under the Act and we have before us no record reflecting the Act's effect on employers." *Id.* The same is true in the instant case, which is also a facial challenge. App. 69.

The Third Circuit recognized that the Ninth Circuit had rejected the preemption through disruption-of-congressional-balancing argument in that case. But the Third Circuit disputed the Ninth

Circuit's reasoning. "Hazleton attempts to parry the thrust of this argument by again relying on the decisions in *Chicanos Por La Causa* and *Gray*.... We believe those decisions undervalue the emphasis Congress placed on preventing discrimination, and the pain-staking [sic] care Congress took to achieve that objective." App. 106. In so concluding, the Third Circuit created a circuit split on this issue.

B. The Third Circuit's Theory Conflicts with This Court's Opinion in *NCIR*.

This Court has already reviewed and rejected a central premise in the Third Circuit's disruption-of-a-congressional-balance preemption theory. In *INS v. National Ctr. for Immigrants' Rights (NCIR)*, 502 U.S. 183 (1991), this Court considered whether the employment provisions of the Immigration and Nationality Act (INA), including particularly the Immigration Reform and Control Act (IRCA), embodied a balance of competing congressional objectives. The specific question was whether the Attorney General had discretion under 8 U.S.C. § 1252(a)(1) to promulgate a blanket rule prohibiting unauthorized aliens released on bond from working in the United States while their deportation proceedings were pending. *Id.* at 184-188. The Court of Appeals had based its negative answer on the notion that IRCA represented a balancing of congressional objectives: "IRCA is a carefully crafted political compromise which at every level balances specifically chosen measures discouraging illegal employment with

measures to protect those who might be adversely affected." *National Ctr. for Immigrants' Rights v. INS*, 913 F.2d 1350, 1366 (9th Cir. 1990). Therefore, the Court of Appeals concluded, "The regulation disrupts the careful balance which Congress achieved in IRCA." *Id.* at 1368. This Court reversed and rejected the notion that IRCA should be interpreted as the expression of an invisible balance between these congressional objectives. This Court held that a primary purpose of IRCA (and the broader INA) was to prevent unauthorized aliens from working. "We have often recognized that a 'primary purpose in restricting immigration is to preserve jobs for American Workers.' ... This policy of immigration law was forcefully recognized most recently in the IRCA." *NCIR*, 502 U.S. at 194, 194 n.8 (*quoting Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 893 (1984)).

The Third Circuit's opinion below attempts to undermine this Court's holding. The Third Circuit actually quoted the court of appeals opinion in *NCIR* in support of its balancing theory, but neglected to mention that this Court subsequently rejected the IRCA-as-congressional-balance notion. App. 89-90. It is imperative that this Court grant the writ to prevent this evisceration of its *NCIR* holding.

C. The Third Circuit's Theory Will Lead to Unguided and Inconsistent Preemption Law Unless This Court Provides Direction.

The writ should be granted in this case because the Third Circuit's theory of preemption through the disruption of congressional balancing threatens to engender a whole new strain of conflict preemption law. Permitting a doctrine of preemption through the disruption of amorphous congressional "balances" opens a Pandora's box of unguided and unpredictable preemption cases. How does a court know when a congressional balance has been created? What evidence of congressional intent should be considered in determining whether such a balance exists? How much activity at the state or local level constitutes preempted disruption of the balance? These questions cannot be easily or intuitively answered. Virtually every act of Congress involves the balancing of competing interests. If a state or local law in the same field conceivably disrupts an unwritten congressional "balance," then just about any state or local law in a field where Congress has legislated can be said to be impliedly preempted. Judicial decisions of this nature represent the sort of freewheeling jurisprudence that Justices on this Court have cautioned against: "A freewheeling judicial inquiry into whether a state statute is in tension with federal objectives would undercut the principle that it is Congress rather than the courts that pre-empts state law." *Gade v. Nat'l Solid Wastes Management Ass'n*, 505 U.S. 88, 111

(1992) (Kennedy, J., concurring); *Wyeth v. Levine*, 129 S. Ct. 1187, 1205 (2009) (Thomas, J., concurring) (rejecting preemption "based on perceived conflicts with broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not embodied within the text of federal law").

Petitioners urge this Court to grant the writ in order to put the theory of preemption through the disruption of congressional balancing to rest. Alternatively, if the theory is to be allowed to continue as a basis for preemption holdings in this area of great national concern, then it is vital for this Court to provide guidance at the earliest possible juncture to ensure consistent opinions by the Article III Courts and by the state courts.

The Ninth Circuit case is now pending before this Court. *Chamber of Commerce v. Whiting* (Case No. 09-115). It is unclear whether this Court in deciding the *Chamber of Commerce v. Whiting* case will address the specific question of whether conflict preemption can occur through the disruption of an implicit congressional balance. If the specific question is not addressed in the *Chamber of Commerce v. Whiting* case, then the circuit split will persist and will cause significant confusion in the courts below. If that is the case, then the writ should be granted in the instant case to resolve the circuit split on this important question.

If, on the other hand, this Court does address the preemption-through-disruption-of-congressional-balancing question in *Chamber of Commerce v. Whiting* and agrees with the State of Arizona's position, then at a minimum this Court should grant the writ, vacate the decision below, and remand (GVR) this case to the Third Circuit for reconsideration in light of that decision. However, because there are several other important preemption questions in the instant case that are not addressed in *Chamber of Commerce v. Whiting*, review by this Court will be necessary to provide desperately-needed guidance on those questions to the lower courts and to the hundreds of municipalities and states that are taking action in this arena. The Third Circuit correctly anticipated that these preemption issues would ultimately have to be resolved by this Court: "The Supreme Court will undoubtedly speak to this tension soon...." App. 85.

II. Review is Warranted Because the Third Circuit's Holding That Employers Cannot be Compelled to Use E-Verify is in Direct Conflict with the Holding of the Ninth Circuit That is Currently Before This Court.

The Third Circuit's conclusion that the employment provisions of the IIRAO are impliedly preempted also rested on a second holding: that Congress intended the E-Verify program to remain strictly voluntary. App. 96-100. That holding, too, is

in direct conflict with the decision of the Ninth Circuit in the *Chamber of Commerce v. Whiting* case that is currently pending before this Court. The IIRAO contains provisions that encourage all employers to use the E-Verify system and compel employers found to have knowingly employed unauthorized aliens to use the E-Verify system. IIRAO §§ 4.B(5)-(6), 4.D, 4.E(1). App. 356-358. The Third Circuit held that the IIRAO effectively coerces employers to use the E-Verify system, and that such coercion conflicts with a supposed congressional objective that E-Verify remain strictly voluntary. App. 96-100.

In so doing, the Third Circuit acknowledged that its decision was in conflict with the holding of the Ninth Circuit. App. 100-101. The Third Circuit also acknowledged that its holding conflicted with that of the U.S. District Court for the Eastern District of Missouri in *Gray v. Valley Park*, 2008 U.S. Dist. LEXIS 7238 (E.D. Mo. Jan. 31, 2008), *aff'd on other grounds*, 567 F.3d 976 (8th Cir. 2009). App. 101. The Third Circuit rejected the reasoning of both courts: "These decisions, however, fail to afford proper weight to the purposes underlying Congress's decision to retain E-Verify as a voluntary program." App. 101.

The Ninth Circuit had come to the exact opposite conclusion. As the Ninth Circuit explained, "Congress could have, but did not, expressly forbid state laws from requiring E-Verify participation." *Chicanos Por La Causa*, 558 F.3d at 867. Instead, Congress through

a variety of enactments, made clear that its objective was to *maximize* usage of the E-Verify program:

> ... E-Verify is a federal government service that Congress has implicitly strongly encouraged by expanding its duration and its availability (to all fifty states).... Though Congress did not mandate E-Verify, Congress plainly envisioned and endorsed an increase in its usage. The [Arizona] Act's requirement that employers participate in E-Verify is consistent with and furthers this purpose, and thus does not raise conflict preemption concerns.

Id. (internal citations omitted).

The specific question of whether a state may require employers to participate in E-Verify is now pending before this Court in *Chamber of Commerce v. Whiting*. Because that particular holding of the Ninth Circuit case is squarely before this Court, and the instant case turns, in part, on the same question, action by this Court will be necessary. If this Court affirms the decision of the Ninth Circuit (an outcome Petitioners believe to be legally correct), then this Court will have to take some action in the instant case. The untenable situation would arise in which a Court of Appeals opinion is allowed to stand even though it is in direct conflict with a nearly-contemporaneous Supreme Court opinion. At the very least, this Court should grant the writ, vacate the decision below, and remand (GVR) this case for reconsideration in accordance with this Court's imminent decision in *Chamber of Commerce v. Whiting*.

However, Petitioners urge the Court to review the instant case in order to address the other implied preemption issues that are detailed in this Petition and are the source of inconsistency and growing uncertainty in the lower courts.

III. Review is Warranted Because in Finding the Harboring Provisions of the IIRAO to be Impliedly Preempted, the Third Circuit has Contradicted this Court's Decision in *De Canas v. Bica*.

This Court last addressed the subject of implied preemption in the immigration context in *De Canas v. Bica*. In that case, this Court sustained against a field preemption challenge a California law that imposed penalties on employers who "knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers." 424 U.S. at 352. The *De Canas* opinion made clear that states and localities possessed wide leeway to "deal[ ] with aliens" without being field preempted: "[T]he Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by this constitutional power, whether latent or exercised." *Id.* at 355.

Importantly, the *De Canas* Court considered and *rejected* the possibility that the regulation of immigration by the federal government might be so

comprehensive that it leaves no room for state laws that discourage illegal immigration. Field preemption so sweeping as to displace harmonious state laws had not occurred:

> Only a demonstration that complete ouster of state power – including state power to promulgate laws not in conflict with federal laws – was "the clear and manifest purpose of Congress" would justify that conclusion.... Respondents have not made that demonstration. They fail to point out, and an independent review does not reveal, any specific indication in either the wording or the legislative history of the INA that Congress intended to preclude *even harmonious state regulation* touching on aliens in general, or the employment of illegal aliens in particular.

424 U.S. at 357-358 (internal citations omitted) (emphasis added).

Prior to the Third Circuit's decision in the instant case, every Circuit to address this question had recognized that states may enact harmonious laws, or engage in "concurrent enforcement" in the field of immigration. "Where state enforcement activities do not impair federal regulatory interests *concurrent enforcement activity is authorized.*" *Gonzales v. Peoria*, 722 F.2d 468, 474 (9th Cir. 1983) (*citing Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963) (emphasis added)). Where "[f]ederal and local enforcement have identical purposes," preemption does not occur. *Gonzales*, 722 F.2d at 474. "No

statute precludes other federal, state, or local law enforcement agencies from taking other action to enforce this nation's immigration laws." *Lynch v. Cannatella*, 810 F.2d 1363, 1367 (5th Cir. 1987). In the words of Judge Learned Hand, "it would be unreasonable to suppose that [the federal government's] purpose was to deny itself any help that the states may allow." *Marsh v. United States*, 29 F.2d 172, 174 (2d Cir. 1928).

Federal district courts reviewing laws similar to the IIRAO have upheld those laws, based on the principle of concurrent enforcement. For example, the Eastern District of Missouri applied the concurrent enforcement doctrine in rejecting a conflict preemption challenge:

> [G]enerally, a state has concurrent jurisdiction with the federal government to enforce federal laws.... This allows for greater enforcement of the federal law, while providing additional local sanctions through the licensing law. There is no conflict between the two laws.

Gray, 2008 U.S. Dist. LEXIS 7238, at *58, aff'd on diff. grounds 567 F.3d 976 (8th Cir. 2009) (*citing Gonzales*, 722 F.2d at 474). The ordinance at issue in *Gray* was virtually identical to the employment provisions of Hazleton's IIRAO. *Id.* at *28-*30.

The IIRAO was constructed specifically to meet the standard of "harmonious state regulation" iterated by this Court in *De Canas*. 424 U.S. at 358. The

IIRAO replicates the harboring provisions of the INA, which impose criminal penalties on:

> Any person who ... knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation.

8 U.S.C. § 1324(a)(1)(A)(iii). The IIRAO also states in its findings section, "The provision of housing to illegal aliens is a fundamental component of harboring," and makes express reference to 8 U.S.C. § 1324(a)(1)(A). IIRAO § 2.E App. 351. The terms of the harboring violation in the IIRAO mirror the elements of the federal harboring law: it is unlawful "to let, lease or rent a dwelling unit to an illegal alien, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law...." IIRAO § 5.A(1). App. 359.

Presented with the IIRAO's harmonious state regulation in the instant case, the Third Circuit's response was to declare that field preemption had occurred – a declaration that directly conflicts with this Court's holding in *De Canas*. App. 112. The Third Circuit justified its assertion by noting that the federal government possesses the exclusive power to remove illegal aliens from the country.

App. 112-113. But this observation, in and of itself, cannot justify a finding of field preemption – because the federal government possessed exclusive removal power in 1976 when this Court decided *De Canas* and held that no field preemption had occurred.

Ironically, the Third Circuit then misapplied an isolated phrase in *De Canas* to reach a field preemption holding that directly conflicts with *De Canas*: "The housing provisions of the IIRAO and the RO are also field pre-empted by the INA.... The 'comprehensiveness of the INA scheme for regulation of immigration and naturalization,' ... plainly precludes state efforts, whether harmonious or conflicting, to regulate residence in this country based on immigration status." App. 112 (*quoting De Canas*, 424 U.S. at 359). Of course, the IIRAO and RO do not regulate whether an alien may lawfully reside in the United States. But the Third Circuit asserted that by simply denying illegal aliens rental accommodations in a single city (while permitting them physical presence and other accommodations in the city), Hazleton had somehow usurped the federal power to remove illegal aliens from the United States. "We recognize, of course, that Hazleton's housing provisions neither control actual physical entry into the City, nor physically expel persons from it. Nonetheless, '[i]n essence,' that is precisely what they attempt to do." App. 112-113. (*quoting Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 160 (1989).

The Third Circuit then surmised that the same field preemption applies both to evicting an illegal

alien from an apartment in a single city and to removing an illegal alien from the territory of the United States. App. 113. By making these leaps of logic to its untenable field preemption holding, the Third Circuit was able to dodge the concurrent enforcement principle: "As we have explained, Hazleton's housing provisions operate in a field in which the federal government exclusively occupies. Therefore, even if Hazleton's housing provisions did concurrently enforce federal law, this would not save them." App. 117-118.

The Third Circuit's field preemption holding is extraordinary, considering that *the Third Circuit did not identify any congressional act* since this Court's 1976 *De Canas* decision that would indicate Congress has displaced all state and local regulation in the field. See App. 112-114. The Third Circuit's strained reasoning also has far-reaching implications. According to the Third Circuit, any local law that makes it difficult for an illegal alien to remain in a city is tantamount to removal, even if it is possible under the law for the illegal alien to remain physically present in the city. App. 112-113. Therefore, a law that makes it difficult to obtain rental accommodation is the equivalent of removal. By the same logic, a law that makes it difficult to find employment in a city (and provide the financial means to pay for food and shelter) would also be tantamount to removal. Thus, any state or local law that prevented the employment of unauthorized aliens would be field

preempted. However, such a conclusion was directly rejected in *De Canas*.

The Third Circuit also completely ignored a relevant section of federal law in reaching its field preemption holding. 8 U.S.C. § 1324(c) authorizes all state and local officers "whose duty it is to enforce criminal laws" to arrest individuals who are guilty of harboring under 8 U.S.C. § 1324(a)(1)(A)(iii). In other words, *Congress has expressly invited state and local governments on to the field*, in an effort to better enforce the federal law against harboring. This provision of federal law plainly undermines the Third Circuit's untenable field preemption holding. Yet the Third Circuit failed even to mention this important statute.

The Third Circuit ruling has significantly distorted and subverted this Court's longstanding holding in *De Canas*. Granting the writ is necessary to ensure that the *De Canas* holding does not become effectively voided by Supreme Court acquiescence or silence.

IV. Review is Warranted Because the Third Circuit has Widened a Split Among the Circuits Regarding What Constitutes Harboring under 8 U.S.C. § 1324(a)(1)(A).

After first dodging the principle of concurrent enforcement through the field preemption maneuver described above, the Third Circuit proceeded to attack it head on. " ... Hazleton is also plainly incorrect in claiming that its housing provisions 'mirror'

federal law. The federal prohibition against harboring has never been interpreted to apply so broadly as to encompass the typical landlord/tenant relationship." App. 117-118. The Third Circuit acknowledged that "the breadth of the term is currently in dispute among the Circuit Courts of Appeals," App. 118, but then declared, "[W]e are not aware of any case in which someone has been convicted of 'harboring' merely because s/he rented an apartment to someone s/he knew (or had reason to know) was not legally in the United States." App. 118. However, as is explained in subsection B, below, harboring has been found under similar circumstances in other Circuits.

A. There is a Split Among the Circuits Concerning the Definition of Harboring under 8 U.S.C. § 1324(a)(1)(A)(iii).

This Court has never defined the term "harboring" under 8 U.S.C. § 1324(a)(1)(A)(iii). App. 118. In 1948, this Court reviewed a predecessor harboring statute and determined that Congress had not created any penalties for harboring in that statute, but did not decide the "question" of the "reach of the statute" because it was not before the Court. *United States v. Evans*, 333 U.S. 483, 489 (1948). However, in *dicta*, the Court hypothesized that "an innkeeper furnishing lodging to an alien lawfully coming in but unlawfully overstaying his visa would be guilty of harboring, if he knew of the illegal remaining." *Id.* at 489.

Congress amended the harboring statute in 1952 to add the penalties that this Court found lacking. *United States v. Lopez*, 521 F.2d 437, 440 (2d Cir. 1972) (*citing* H.R. Rep. No. 1377, 82d Cong., 2d Sess. (1952)). In amending the harboring statute, "members of Congress appear[ed] to have assumed that one providing shelter with knowledge of the alien's illegal presence would violate the Act ... " *Id.* However, this Court still has not defined the "reach of the statute." *Evans*, 333 U.S. at 489.

In the absence of Supreme Court guidance over the past 62 years, multiple interpretations of 8 U.S.C. § 1324(a)(1)(A)(iii) have emerged. The Third Circuit acknowledged this circuit split: "Some courts, our own included, have found that culpability requires some conduct that helps to conceal an alien from authorities." App. 118. "[O]ther Courts of Appeals have held that a showing of concealment is unnecessary, and that conduct which merely 'substantially facilitates an alien's remaining in the country illegally' is sufficient to constitute harboring." App. 119. (*quoting United States v. Tipton*, 518 F.3d 591, 595 (8th Cir. 2008). Other Circuits have acknowledged this circuit split as well. See *Lopez*, 521 F.2d at 440, n.3 (declining to adopt Sixth Circuit's outdated "clandestine sheltering" test for harboring); *United States v. Acosta de Evans*, 531 F.2d 428, 430 (9th Cir. 1976).

Because this Court has yet to respond to requests from the Courts of Appeals for guidance on this issue, at least three distinct tests now exist among the Circuits. The Third Circuit has the most restrictive

test to prove harboring by requiring two non-statutory elements: "conduct 'tending to substantially facilitate an alien's remaining in the United States illegally *and to prevent government authorities from detecting the alien's unlawful presence*.'" App. 118 (*quoting United States v. Ozcelik*, 527 F.3d 88, 100 (3d Cir. 2008)) (emphasis in original). The Fifth and Eighth Circuits require only a showing that the "conduct tends to substantially facilitate an alien's remaining in the United States illegally," with no requirement of preventing detection. *United States v. Herrera*, 584 F.2d 1137, 1144 (5th Cir. 1978) (To prove harboring, the government must show that the "conduct tend[ed] substantially to facilitate an alien's 'remaining in the United States illegally'" but "[s]uch conduct need not be clandestine.") (internal citations omitted); *United States v. Martinez-Medina*, 2009 U.S. App. LEXIS 890, *3 (5th Cir. 2009); *United States v. Tipton*, 518 F.3d 591 (8th Cir. 2006). Finally, the Seventh and Ninth Circuits have the broadest formulation of what constitutes harboring. The Seventh Circuit relies solely on the three elements that are actually found in 8 U.S.C. § 1324a(1)(A)(iii). *United States v. Ye*, 588 F.3d 411, 416 (7th Cir. 2009). And, the Ninth Circuit relies on the "plain meaning" of the statute, holding that harboring means "to afford shelter to," without a showing of clandestine sheltering being necessary. *Acosta de Evans*, 531 F.2d at 430;

United States v. Aguilar, 883 F.2d 662, 689 (9th Cir. 1989).[2]

Until its decision in the instant case, it was unclear whether the Third Circuit would insist that both non-statutory elements be met to prove harboring. When the Third Circuit first examined harboring, it claimed to "agree with the Fifth Circuit that ... harboring ... encompass[ed] conduct 'tending to substantially facilitate an alien's remaining in the United States illegally' and to prevent government authorities from detecting the alien's unlawful presence." *United States v. Ozcelik*, 527 F.3d 88, 100 (3d Cir. 2008) (*citing United States v. Rubio-Gonzalez*, 674 F.2d 1067, 1073 (5th Cir. 1982)). However, the second element of "prevent[ing] ... detect[ion]" is found nowhere in *Rubio-Gonzalez* and has been expressly rejected by the Fifth Circuit. *Herrera*, 584 F.2d at 1144; *Martinez-Medina*, 2009 U.S. App. LEXIS 890, *3. If the Third Circuit had actually subscribed to the Fifth Circuit test, as it claimed to do in *Ozcelik*, it would not have required this second element.

Prior to the Third Circuit's decision in the instant case, only the Sixth Circuit had unambiguously required some kind of element of preventing detection. However, that holding is 82 years old. *Susnjar*

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[2] The Fourth Circuit seems to follow a standard somewhere between the "substantially facilitates" standard of the Fifth and Eighth Circuits and the textual standards of the Seventh and Ninth Circuits, rather than the Third Circuit's. See *United States v. Batjargal*, 302 Fed. Appx. 188, 191 (4th Cir. 2008).

v. United States, 27 F.2d 223, 224 (6th Cir. 1928). Both the Second and Ninth Circuits disagreed with the *Susnjar* "clandestine sheltering" test because *Susnjar* was interpreting a pre-1952 harboring statute, and it predated the Supreme Court's 1948 *Evans* decision. *Lopez*, 521 F.2d at 440 n.3; *Acosta de Evans*, 531 F.2d at 430. However, the Sixth Circuit's holding in *Susnjar* still stands as precedent in that Circuit, and the district courts there continue to follow it. See *United States v. Belevin-Ramales*, 458 F. Supp. 2d 409, 411 (E.D. Ky. 2006); see also *Hager v. ABX Air, Inc.*, 2008 U.S. Dist. LEXIS 23486, **19-20 (S.D. Ohio Mar. 25, 2008).

With its holding in the instant case, the Third Circuit now joins the Sixth Circuit in expressly requiring a showing of preventing detection for harboring to occur.[3] Review by this Court is necessary to bring uniformity to the Circuits on this question.

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[3] The position of the Second Circuit is unclear. Its opinion in *United States v. Kim*, 193 F.3d 567, 574 (2d Cir. 1999) described a test similar to the Third Circuit's. However, its earlier opinion in *Lopez* disagreed with the position that "clandestine sheltering" was required. *Lopez*, 521 F.2d at 440, n.3.

B. The Third Circuit's Test Would Have Resulted in a Different Outcome in Cases Decided Previously by Other Circuits That Do Not Require a Showing of Preventing Detection.

As a result of the Third Circuit's holding, cases presenting similar facts in separate Circuits will now be decided differently. In the instant case, the Third Circuit flatly rejected Hazleton's contention that knowingly leasing an apartment to an illegal alien constitutes harboring under federal law. The Court declared that "much more" than knowledge of an alien's unlawful status is needed to "turn renting ... into harboring," App. 120. However, the Ninth Circuit has found harboring to exist where a person knowingly rented an apartment to an illegal alien. The Fifth Circuit has likewise found harboring where an individual merely acknowledged that he knew illegal aliens were living at his home. Neither Circuit requires preventing detection by authorities.

In *United States v. Franco-Beltran*, 229 Fed. Appx. 592 (9th Cir. 2007), the Ninth Circuit sustained the conviction of an apartment manager who charged inflated rent to known illegal alien tenants and who allowed multiple illegal aliens to reside in those apartments. *Id.* at *4. Consistent with prior holdings in the Ninth Circuit, nothing in the opinion indicated that the apartment manager attempted to hide the illegal aliens from detection. See *id.* However, if the case had arisen in the Third Circuit, that same apartment manager would not have been convicted of

harboring. See App. 118 ("It is highly unlikely that a landlord's renting of an apartment to an alien lacking lawful immigration status could ever, without more, satisfy [the Third Circuit] definition of harboring" because "[r]enting an apartment in the normal course of business is not in and of itself conduct that prevents the government from detecting an alien's presence.").

In the Ninth Circuit case of *Acosta de Evans*, the defendant was convicted of harboring an illegal alien who had been living in the defendant's apartment for two months. 531 F.2d at 429. The defendant argued that she did not "harbor" the illegal alien because she did not try "to prevent detection by law enforcement agents." *Id.* Rejecting that argument, the court held that the "purpose" of the harboring statute was to "keep unauthorized aliens from entering or remaining in the country," and that "purpose is best effectuated by construing 'harbor' to mean 'afford shelter to.'" *Id.* at 430. If the Ninth Circuit had applied the Third Circuit's test, the defendant would have been acquitted.

In the Fifth Circuit, *United States v. Balderas*, 91 Fed. Appx. 354 (5th Cir. 2004), cert. denied, *Balderas v. United States*, 540 U.S. 910 (2004), would have been decided differently had the Court used the Third Circuit's test. In that case, the defendant allowed illegal aliens to stay in a section of his home. The Fifth Circuit affirmed the judgment of the district court because "there was evidence that: next

to Balderas' residence was a red light that could function as a signal to aliens; Balderas' wife let a group of aliens into their home; she informed Balderas that there were illegal aliens staying there; and he told her he did not care." *Id.* at 355. It was unclear whether Balderas charged the illegal aliens rent or not. See *id.* Regardless, under the Third Circuit's test, Balderas would have been acquitted because he took no actions himself to prevent detection.

In sum, the Third Circuit has now widened what was already a yawning split among the Circuits on this question. If the Supreme Court does not take the opportunity to provide guidance as to what constitutes harboring, widely varying interpretations will persist. Confusion will remain among prosecutors in the varying jurisdictions, as well as among States and municipalities that are trying to concurrently prevent the harboring of illegal aliens in order to assist the federal government in enforcing immigration laws.

V. Review is Warranted Because this Case Presents an Issue of Exceptional National Importance

The breakdown of the rule of law in immigration is one of the greatest legal challenges facing this country. An illegal immigration wave has swept the

country since the mid-1980s, with the result that approximately 11 million illegal aliens currently live in the United States.[4]

Recognizing that a problem of this scope and difficulty cannot be solved by federal action alone, Congress has consistently encouraged states and municipalities to assist in the enforcement of federal immigration laws. The rule of law can be restored only if all levels of government are working together to provide what assistance they can. As the Tenth Circuit has observed, "in the months following the enactment of § 1252c, Congress passed a series of provisions designed to encourage cooperation between the federal government and the states in the enforcement of federal immigration laws." *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1300 (10th Cir. 1999). A number of Congressional actions are particularly salient in this regard.

Most importantly, in 1996 Congress created a federal statutory structure to accommodate local programs by enacting 8 U.S.C. § 1373. Congress placed the federal executive branch under a statutory

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[4] Hoefer, Michael, *Population Estimates: Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2009* (January 2010), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2009.pdf.

obligation to respond to all local inquiries concerning the immigration statuses of particular aliens:

> **Obligation to respond to inquiries**
>
> The Immigration and Naturalization Service *shall respond* to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency *for any purpose authorized by law*, by providing the requested verification or status information.

8 U.S.C. § 1373(c) (emphasis added). Congress also recognized the interest of cities in "[s]ending" and "[m]aintaining" such "information regarding the immigration status, lawful or unlawful, of any individual." 8 U.S.C. § 1373(b)(1)-(2). This indicates that Congress expected state and local governments to develop programs under which they would make inquiries about the legal statuses of aliens.

The Senate Report accompanying this legislation spelled out Congress's objective of encouraging states and local assistance:

> Effective immigration law enforcement requires a cooperative effort between all levels of government. The acquisition, maintenance, and exchange of immigration-related information by State and local agencies is consistent with, and potentially of considerable assistance to, the Federal regulation of immigration and the achieving of the

> purposes and objectives of the Immigration and Nationality Act.

Sen. Rep. No. 104-249, 104th Cong., 2d Sess. at 19-20 (1996). The IIRAO was built around 8 U.S.C. § 1373 and the cooperation that it envisions, referring to this federal statute throughout the Ordinance. IIRAO §§ 3.D, 4.B(3), 4.B(7), 5.B(3), 5.B(4), 5.B(7), 5.B(9), 7.D(2), 7.E, 7.G App. 353, 357, 360-362, 366-367.

Congress also enacted the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104-193, 110 Stat. 2105 (1996). In so doing, Congress required states and localities to verify with the federal government the status of aliens seeking public benefits. Congress mandated that an "unqualified alien," which includes an unlawfully present alien, "is not eligible for any State or local public benefits." 8 U.S.C. § 1621(a). States and localities were required to determine the status of aliens seeking such benefits. These statutes and others reflect Congress's intent to encourage state and local efforts to deter illegal immigration and the employment of unauthorized aliens. See also, *e.g.*, 8 U.S.C. § 1357(g)(10); 8 U.S.C. § 1601(6)-(7).

The Third Circuit's holding now stands in the way of Congress achieving its objective of utilizing state and local assistance. The Third Circuit's sweeping opinion casts doubt on dozens of state and local programs designed to assist the federal government in discouraging illegal immigration.

One particular holding of the Third Circuit is especially problematic. The Court asserted that an

illegal alien who has not been removed by the federal government (presumably because of federal resource constraints) has somehow been given *permission to remain* in the United States. In other words, the illegal alien is legal until the federal government decides to expend the resources to remove him. The only support that the Third Circuit could find for this astonishing claim was the opinion of the District Court below: "As the district court found, the [federal] government purposefully exercises its discretion not to prosecute in certain instances, and thereby tacitly allows the presence of those whose technical status remains 'illegal.'" App. 115 (*citing* 496 F.Supp.2d at 531, n.56; App. 274).

This holding is problematic for three reasons. First, it suggests that an illegal alien can be simultaneously "technically" unlawfully present but *de facto* lawfully present. No other Circuit has made such an assertion. Second, it takes the primary reason that Congress has repeatedly *sought* state and local help in immigration enforcement – federal resource constraints – and turns it into a reason that States and localities *cannot* act. Third, the implication of this holding is that States and municipalities may not take any action to encourage illegal aliens to leave their jurisdiction, because those illegal aliens may be *de facto* lawfully present. This third aspect of the holding will cause the greatest uncertainty among the lower courts. If it is correct, then state and local programs to discourage illegal immigration must necessarily grind to a halt. No illegal alien can be denied any job or any public benefit if the alien has

been given tacit permission to remain in the United States by the federal government. Costly and protracted litigation over the hundreds of State and local laws on the subject will ensue. Rather than giving force to federal law, the Third Circuit's holding stands as a significant obstacle to the accomplishment of congressional objectives. Because the success of immigration law enforcement in the United States may well turn on whether such State and local efforts can continue, review is urgently warranted.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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December 8, 2010

620 F.3d 170

United States Court of Appeals,
Third Circuit.
Pedro LOZANO; Humberto Hernandez; Rosa Lechuga; John Doe 1; John Doe 2; John Doe 3, a Minor, by His parents; Jane Doe 1; Jane Doe 2; Jane Doe 3; John Doe 4, a Minor by His parents, Brenda Lee Mieles; Casa Dominicana of Hazleton, Inc.; Hazleton Hispanic Business Association; Pennsylvania Statewide Latino Coalition; Jane Doe 5; John Doe 7; Jose Luis Lechuga
v.
CITY OF HAZLETON, Appellant.
No. 07-3531.Argued Oct. 30, 2008.
Opinion filed Sept. 9, 2010.

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Before McKEE, Chief Judge, and NYGAARD and SILER,* Circuit Judges.

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* Honorable Eugene E. Siler, Jr., Senior Judge of the United States Court of Appeals for the Sixth Circuit, sitting by designation.

OPINION

McKEE, Chief Judge.

I. INTRODUCTION

"Since the late 19th century, the United States has restricted immigration into this country. . . . But despite the existence of these legal restrictions, a substantial number of persons have succeeded in unlawfully entering the United States, and now live within [the] various States." *Plyler v. Doe*, 457 U.S. 202, 205, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982). The dispute we are now called upon to address is one of an increasing number of cases that have arisen from actions that state and local governments have taken because of illegal immigration.

The City of Hazleton, Pennsylvania ("Hazleton" or the "City") is appealing a permanent injunction that the district court entered prohibiting Hazleton's enforcement of two local ordinances that attempt to regulate employment of, and provision of rental housing to, certain aliens. Several individuals and organizations sued to enjoin enforcement of the ordinances arguing that they violate the United States Constitution, as well as federal and state statutes. The district court agreed and enjoined Hazleton from enforcing the ordinances in their entirety.

We now hold that the district court erred in reaching the merits of the challenge to the private

cause of action provision because no plaintiff has standing to challenge that provision. Accordingly, that portion of the district court's order will be vacated. However, although our reasoning differs somewhat from the analysis used by the district court, we conclude that it correctly enjoined the rest of the challenged ordinances. We will therefore affirm the district court's order in all other respects.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Hazleton and its Ordinances

The City of Hazleton is located in Luzerne County in northeastern Pennsylvania. *Lozano v. City of Hazleton*, 496 F.Supp.2d 477, 484 (M.D.Pa.2007). Under Pennsylvania law, Hazleton is classified as a City of the Third Class and operates under an "Optional Plan B" form of government. *Id.* Its executive is a mayor, and its legislature is a city council. *Id.*

Hazleton's population was only 23,000 in 2000. *Id.* Between 2000 and the time of trial, however, its population increased to between 30,000 and 33,000. *Id.* Much of this growth was due to an influx of Latino families who migrated from New York and New Jersey to Pennsylvania in the early 2000s. *Id.* These newcomers included United States citizens and lawful permanent residents, as well as persons lacking lawful immigration status, who are often referred

to as "undocumented immigrants" or "illegal aliens."[1] *Id.*

Hazleton's mayor, as well as other local officials, subsequently concluded that aliens lacking lawful status were to blame for certain social problems in the City, *see* J.A. 1672-85, and that the federal

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[1] Hazleton refers to persons who are not lawfully present within the United States as "illegal aliens." Plaintiffs refer to them as "undocumented immigrants." We recognize that there are significant criticisms of each term. *See, e.g.*, Beth Lyon, *When More "Security" Equals Less Workplace Safety: Reconsidering U.S. Laws that Disadvantage Unauthorized Workers*, 6 U. Pa. J. Lab. & Empl. L. 571, 576 (2004) ("Scholarly and popular concerns about the phrase 'illegal alien' abound, pointing out that the phrase is racially loaded, ambiguous, imprecise, and pejorative."); *Martinez v. Regents of the Univ. of Cal.*, 83 Cal.Rptr.3d 518, 522 n. 2 (Cal.Ct.App.2008) ("[T]he term 'illegal alien' [is] less ambiguous [than the term 'undocumented immigrant.']"), *rev. granted*, 87 Cal.Rptr.3d 198, 198 P.3d 1 (Cal.2008).

Federal immigration law defines an "alien" as "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3). "Immigrant" is defined as "every alien except an alien who is within [certain specified] classes of nonimmigrant aliens," and generally refers only to lawful permanent residents. 8 U.S.C. § 1101(a)(15). Congress has preferred the term "alien" to describe those persons who lack lawful immigration status, *see, e.g.*, 8 U.S.C. §§ 1182, 1227, 1228. We will use the word "alien" rather than "immigrant" because "alien" is more precise, and precision is important to discussions in this area. When discussing issues of employment, we will use the official term: "unauthorized alien." 8 U.S.C. § 1324a. However, when discussing issues of immigration status, we will use either: "aliens not lawfully present" or "aliens lacking lawful immigration status," rather than "illegal aliens."

government could not be relied upon to prevent such aliens from moving into the City, or to remove them, *see Lozano,* 496 F.Supp.2d at 522 n. 44. Accordingly, City officials decided to take independent action to regulate the local effects of unlawful immigration. *See* J.A. 1385, 1486-87. Beginning on July 13, 2006, Hazleton's City Council began enacting a series of ordinances designed to address these concerns. *Lozano,* 496 F.Supp.2d at 484.

This litigation concerns two of those ordinances: the Illegal Immigration Relief Act Ordinance ("IIRAO"), which consists of Ordinance 2006-18, as amended by Ordinance 2006-40 and Ordinance 2007-6; and the Rental Registration Ordinance ("RO"), which consists of Ordinance 2006-13.[2] These ordinances attempt to regulate the employment of unauthorized aliens, and the provision of rental housing to aliens lacking lawful immigration status, within Hazleton.

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[2] On July 13, 2006, Hazleton enacted Ordinance 2006-10, the first version of the IIRAO. On August 15, 2006, the City enacted Ordinance 2006-13, the RO. On September 21, 2006, Hazleton enacted Ordinance 2006-18, a revised version of the IIRAO, which replaced Ordinance 2006-10 in its entirety. On December 28, 2006, Hazleton enacted Ordinance 2006-40, which amended the IIRAO by adding an "implementation and process" section. Finally, during trial, the City enacted Ordinance 2007-6, which again amended the IIRAO to provide that complaints based, in full or in part, on national origin, ethnicity, or race, would be considered invalid. The full-text of these ordinances is attached as an Appendix.

1. The Illegal Immigration Relief Act Ordinance

The IIRAO begins with a statement of findings and a declaration of purpose, which asserts:

> [t]hat unlawful employment, the harboring of illegal aliens in dwelling units in the City of Hazleton, and crime committed by illegal aliens harm the health, safety and welfare of authorized U.S. workers and legal residents in the City of Hazleton. Illegal immigration leads to higher crime rates, subjects our hospitals to fiscal hardship and legal residents to substandard quality of care, contributed to other burdens on public services, increasing their cost and diminishing their availability to legal residents, and diminishes our overall quality of life.

IIRAO § 2C.[3] In response to these concerns, the IIRAO:

> seeks to secure to those lawfully present in the United States and this City, whether or not they are citizens of the United States, the right to live in peace free from the threat [of] crime, to enjoy the public services

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[3] It is important to note that the parties hotly contest whether aliens in Hazleton actually caused any of these purported problems and whether Hazleton officials had any valid reason to think they did. The district court did not make any factual findings about the cause of any social or fiscal problems Hazleton may be facing, and our discussion should not be interpreted as supporting either side of that debate.

> provided by this city without being burdened by the cost of providing goods, support and services to aliens unlawfully present in the United States, and to be free of the debilitating effects on their economic and social well being imposed by the influx of illegal aliens to the fullest extent that these goals can be achieved consistent with the Constitution and Laws of the United States and the Commonwealth of Pennsylvania.

IIRAO § 2F.

Section 4 of the IIRAO asserts that it is unlawful "for any business entity" to "recruit, hire for employment, or continue to employ" *or* "permit, dispatch, or instruct any person" who is an "unlawful worker" to perform work within Hazleton.[4] IIRAO § 4A. Under the IIRAO, an "unlawful worker" is defined as: "a person who does not have the legal right or authorization to work due to an impediment in any provision of federal, state or local law, including but not limited to a minor disqualified by nonage, or an unauthorized

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[4] The IIRAO defines "business entity" broadly to mean "any person or group of persons performing or engaging in any activity, enterprise, profession, or occupation for gain, benefit, advantage, or livelihood, whether for profit or not for profit." IIRAO § 3A. The term encompasses (but is not limited to) "self-employed individuals, partnerships, corporations, contractors, and subcontractors." IIRAO § 3A(1). It includes "any business entity that possesses a business permit, any business entity that is exempt by law from obtaining such a business permit, and any business entity that is operating unlawfully without such a business permit." IIRAO § 3A(2).

alien as defined by [8 U.S.C. § 1324a(h)(3)]." IIRAO § 3E. Section 4A requires "[e]very business entity that applies for a business permit" to "sign an affidavit . . . affirming that they do not knowingly utilize the services or hire any person who is an unlawful worker." IIRAO § 4A.

Section 4 also provides for public monitoring, prosecution, and sanctions. Any City resident may submit a complaint to Hazleton's Code Enforcement Office alleging that a local business entity is violating the section's prohibition on utilizing the services of an unlawful worker. IIRAO § 4B(1). Upon receipt of such complaint, the Code Enforcement Office requests identity information about the alleged unlawful worker from the employing business, and that business must provide the information within three business days, or Hazleton will suspend its business license. IIRAO § 4B(3). If the worker is alleged to be an unauthorized alien, the Code Enforcement Office submits any identity information received from the business to the federal government, pursuant to 8 U.S.C. § 1373, for verification of "the immigration status of such person(s)."[5] *Id.*

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[5] 8 U.S.C. § 1373(c) states: "The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information."

If the Code Enforcement Office confirms that the worker lacks authorization to work in the United States, the business must terminate that person within three business days or the City will suspend its business license.[6] IIRAO § 4B(4). Safe harbor from this sanction is provided to businesses that verify the work authorization of its workers through use of the "Basic Pilot Program" (which has since been named "E-Verify"). IIRAO § 4B(5). E-Verify is a federal program for verifying work authorization which Congress has authorized for use on a trial basis.

A business whose license is suspended under the IIRAO regains its license one business day after it submits an affidavit affirming that it has terminated the unlawful worker. IIRAO § 4B(6). If a business is found to have employed two or more unauthorized aliens at one time, it must also confirm its enrollment in E-Verify in order to recover its license.[7] IIRAO § 4B(6)(b). If a business entity violates the IIRAO a second time, Hazleton suspends its license for a minimum of twenty days and reports the violation,

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[6] This three business day period is tolled if the business entity acquires further information about the worker and requests a secondary verification from the federal government of the worker's authorization, or if the business entity tries to terminate the worker and that worker challenges the termination in Pennsylvania state court. IIRAO § 7C.

[7] City agencies and business that contract with the City for amounts greater than $10,000 are also required to enroll in E-Verify. IIRAO § 4C-D.

whether or not eventually corrected, to the federal government. IIRAO § 4B(7).

The IIRAO further creates a private cause of action against businesses that employ unlawful workers. Section 4E of the IIRAO makes it "an unfair business practice" for a business entity to discharge "an employee who is not an unlawful worker," if, on the date of the discharge, "the business entity was not participating in [E-Verify] and the business entity was employing an unlawful worker." IIRAO § 4E(1). An employee discharged under these conditions may sue the business entity under the IIRAO for treble actual damages, as well as reasonable attorney's fees and costs.[8] IIRAO § 4E(2).

The IIRAO also addresses the "harboring" of persons lacking lawful immigration status. Section 5 makes it "unlawful for any person or business entity that owns a dwelling unit in the City to harbor an illegal alien in the dwelling unit, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law."[9] IIRAO § 5A. "Harboring" is broadly defined. The ordinance states: "to let, lease, or rent a

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[8] Even an employee who is properly terminated for cause (or without cause in the case of an employee at will) has a cause of action under this provision. The ordinance uses "lost" wages as a measure of "damages." IIRAO § 4E(2).

[9] The IIRAO defines an "illegal alien" as "an alien who is not lawfully present in the United States, according to the terms of United States Code Title 8, section 1101 et seq." IIRAO § 3D.

dwelling unit to an illegal alien . . . shall be deemed to constitute harboring." IIRAO § 5A(1). Additionally, Section 7 of the IIRAO makes legal immigration status a condition precedent to entering into a valid lease. IIRAO § 7B. All leases entered into by persons lacking lawful status are deemed breached. *Id.*

The mechanisms for enforcing the housing provisions of the IIRAO are similar to those set forth above for enforcing the employment provisions. Thus, any City resident may file a complaint with Hazleton's Code Enforcement Office alleging that a property owner is illegally "harboring" a tenant who is an "illegal alien." IIRAO § 5B(1). Once such a complaint is received, the Code Enforcement Office may request identifying information about the named tenant from the property owner, and the property owner must provide that information within three days. IIRAO § 5A(3). The City then verifies the legality of the tenant's immigration status with the federal government, pursuant to 8 U.S.C. § 1373(c). IIRAO § 5B(3).

If the federal government confirms that the tenant lacks lawful immigration status, the IIRAO gives the property owner five business days to evict that tenant. IIRAO § 5B(4). If the owner fails to do so, the City suspends the owner's rental license and bars the owner from collecting any rent for the applicable dwelling unit.[10] IIRAO § 5B(4)-(5). These sanctions

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[10] This five business day period is tolled if the property owner acquires further information about the tenant and

(Continued on following page)

end one business day after the owner submits an affidavit affirming that s/he has corrected the violation. IIRAO § 5B(6). Any subsequent violation subjects the owner to a fine of $250.00 per day per "adult illegal alien" harbored in a dwelling unit, as well as suspension of her/his rental license. IIRAO §§ 5A(2), 5B(8).

2. The Rental Registration Ordinance

The RO operates in conjunction with the anti-harboring provisions of the IIRAO. Section 7 of the RO requires that *any* prospective occupant of rental housing over the age of eighteen apply for and receive an occupancy permit. RO §§ 1m, 7b. To receive that permit, the prospective occupant must pay a ten-dollar fee and must submit certain documents, including "[p]roper identification showing proof of legal citizenship and/or residency" to Hazleton's Code Enforcement Office. RO § 7b. Hazleton landlords are required to inform all prospective occupants of this requirement, and they are prohibited from allowing anyone over the age of eighteen to rent or occupy a rental unit, unless that person has a permit. *Id.*

Section 10 of the RO provides that a landlord found guilty of renting to someone without a permit

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requests a secondary verification from the federal government of the tenant's immigration status, or if the property owner tries to evict the tenant and that tenant challenges the eviction in Pennsylvania state court. IIRAO § 7D.

must pay an initial fine of $1000 per unauthorized occupant, and an additional fine of $100 per day per unauthorized occupant until the violation is corrected. RO § 10b. An authorized occupant of rental housing who is found guilty of permitting someone without a rental permit to live in her/his apartment must pay the same fine. *Id.*

B. The Plaintiffs

The following six plaintiffs claim that they have standing to bring this suit: Pedro Lozano, John Doe 1, John Doe 3, John Doe 7, Jane Doe 5, and the Hazleton Hispanic Business Association ("Plaintiffs").[11] business entities, landlords, and tenants, as well as an organization whose members include Hazleton business entities and landlords. We briefly describe these Plaintiffs, and the basic facts underlying each Plaintiff's claim to standing.

Pedro Lozano is a lawful permanent resident who immigrated to the United States from Colombia in January 2002. *Lozano,* 496 F.Supp.2d at 485-86. He owns a duplex in Hazleton and rents out half of it to help pay his mortgage. *Id.* at 488. He hires

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[11] Eleven plaintiffs filed the operative complaint. The district court dismissed three of them for lack of standing, and that portion of the district court's decision is not being appealed. Of the eight plaintiffs the district court found to have standing, only six press their cases on appeal.

contractors to perform repairs on his property as needed. *Id.* at 489.

John Doe 1 was born in Mexico, and had lived in Hazleton for six years at the time of trial. *Id.* at 486. He is unsure of his immigration status, but believes that he could be removed from the United States. *Id.* He is similarly unsure of his work authorization. *Id.* John Doe 1's landlord evicted him because of the risk of being fined pursuant to the aforementioned provisions of the IIRAO and the RO. *Id.* at 497.

John Doe 3 had lived in Hazleton for four years at the time of trial. *Id.* at 486. He understands his immigration status to be "illegal," and he rents an apartment within Hazleton. *Id.* at 497.

John Doe 7 and Jane Doe 5 were born in Columbia and had lived in Hazleton for more than five years at the time of trial. *Id.* at 486. They rent a house in Hazleton, but fear eviction and being forced to leave Hazleton if the ordinances are enforced. *Id.* at 497.

The Hazleton Hispanic Business Association ("HHBA") is an organization of business owners from the Hazleton area that exists to "promote the interest of [its] business members and to project the image of the Hispanic business community." *Id.* at 492 (internal quotation marks omitted). HHBA's president, Rudolfo Espinal, owns three rental properties in Hazleton and hires contractors to perform repairs on those properties as needed. *Id.* at 492-93.

C. Procedural History

As noted above, numerous plaintiffs filed this action for injunctive relief based upon challenges to the validity of the IIRAO and the RO. *Lozano*, 496 F.Supp.2d at 485. The district court granted these plaintiffs' motion for a temporary restraining order, and the parties agreed to extend that order until the case could be resolved on its merits. *Id.* These ordinances have never been enforced, and the challenges asserted are facial.

The amended complaint alleges that the ordinances violate the Supremacy Clause, the Due Process Clause, and the Equal Protection Clause of the United States Constitution; 42 U.S.C. § 1981; the federal Fair Housing Act, 42 U.S.C. §§ 3601-31; plaintiffs' privacy rights; Pennsylvania's Home Rule Charter Law, 53 Pa. Cons.Stat. §§ 2961-67; Pennsylvania's Landlord and Tenant Act, 68 Pa. Cons.Stat. §§ 250.101-250.602; and the limits of Hazleton's police powers. *Id.*

At the conclusion of a nine-day bench trial, the district court issued a thorough opinion and order permanently enjoining the City from enforcing the ordinances. The court concluded that eight of the eleven plaintiffs had standing to challenge the IIRAO and the RO, and that it was appropriate for the John and Jane Doe Plaintiffs to proceed anonymously. The court held that the IIRAO and the RO violate the Supremacy and Due Process Clauses of the United States Constitution, as well as 42 U.S.C. § 1981. The

court also held that Hazleton, as a City of the Third Class, lacked authority under Pennsylvania's Home Rule Charter Law to create the IIRAO's private cause of action, and that it exceeded its police powers in enacting these ordinances.[12]

This appeal followed. Hazleton argues that Plaintiffs lack standing, and that the district court abused its discretion both in permitting the John and Jane Doe Plaintiffs to proceed anonymously and in issuing a confidentiality order prohibiting Hazleton from disclosing the Doe Plaintiffs' identity information to the federal government. Hazleton further contends that Plaintiffs' claims are meritless, and that the ordinances are valid under federal and state law.

III. JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1367. We have jurisdiction pursuant to 28 U.S.C. § 1291.

We review a district court's conclusions of law de novo and its factual findings for clear error. *See, e.g., McCutcheon v. Am.'s Servicing Co.*, 560 F.3d 143, 147 (3d Cir.2009). We review a district court's grant of a

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[12] The district court dismissed the Equal Protection, Fair Housing Act, privacy, and Pennsylvania Landlord and Tenant Act claims, and those portions of its order have also not been appealed.

motion to proceed anonymously and grant of a confidentiality order for abuse of discretion. *Doe v. C.A.R.S. Prot. Plus, Inc.*, 527 F.3d 358, 371 & n. 2 (3d Cir.2008).

IV. SEVERABILITY AND STANDING

We first address the threshold question of Plaintiffs' standing. Here, however, standing implicates the issue of severability – an issue which has yet to be explicitly discussed in this suit. As we explained in *Contractors Ass'n v. City of Philadelphia*, "[c]ourts considering constitutional challenges to statutes often analyze standing problems in terms of the severability doctrine. . . . The severability doctrine governs whether [plaintiffs] have standing to challenge [an] entire [o]rdinance, or just [certain provisions]." 6 F.3d 990, 996 (3d Cir.1993).

Severability, however, like any non-jurisdictional issue, can be waived, and it is clear that Hazleton has, with one exception, waived issues of severability here. The district court considered whether Plaintiffs have standing to challenge the "employment provisions" and the "housing provisions" of these ordinances as collective wholes, and conducted its merits inquiries accordingly. *See, e.g., Lozano,* 496 F.Supp.2d at 518 ("[T]he ordinances at issue have two distinct provisions, one directed to employment issues and one aimed at landlord/tenant issues, [and] we will discuss each topic separately with regard to preemption."). On appeal, Hazleton does not contest the

district court's failure to further sever the ordinances. Rather, Hazleton's brief characterizes the ordinances the same way the district court did. Thus, Hazleton argues that Plaintiffs lack standing to challenge the "employment provisions" and the "housing provisions," and that the "employment provisions" and the "housing provisions" are not pre-empted, without further differentiating among those provisions.[13]

The sole severability issue Hazleton has not waived concerns the IIRAO's private cause of action. Hazleton has argued that the private cause of action is severable from the rest of the IIRAO's "employment provisions" both in its brief and at oral argument. Severability of a local ordinance is a question of state law, and Pennsylvania law favors severability. *Contractors Ass'n*, 6 F.3d at 997. Additionally, there is a presumption in favor of severability where, as here, the ordinances contain a severability provision. *Id.* For an ordinance to be severable, "[t]he legislating body must have intended that the act or ordinance be separable and the statute or ordinance must be capable of separation in fact. The valid portion of the enactment must be independent and complete within

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[13] We note that Hazleton's waiver of this issue likely speaks to the merits of a severability analysis as well, as severability often turns significantly on intent. If Hazleton had truly intended each provision of the IIRAO and the RO to operate independently, and to stand or fall independently of the other provisions of this regulatory scheme, it surely would have pressed that point sometime during this litigation. It has not done so.

itself." *Saulsbury v. Bethlehem Steel Co.*, 413 Pa. 316, 196 A.2d 664, 667 (1964) (emphasis omitted).

Here the IIRAO's severability provision indicates that Hazleton's City Council did intend the private cause of action provision to be severable from the balance of its regulatory scheme. Furthermore, the private cause of action is not intertwined with the other "employment provisions," most of which concern business licensing requirements. It can operate independently and is "capable of separation in fact." *Id.* We therefore conclude that it is severable. Accordingly, we will evaluate Plaintiffs' standing to challenge the IIRAO's private cause of action independently of their standing to challenge the other "employment provisions" and the "housing provisions."

In essence, the question of standing asks "whether the litigant[s][are] entitled to have the court decide the merits of the dispute." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). As we will explain, we conclude that there is at least one Plaintiff with standing to challenge the employment and housing provisions of these ordinances. Accordingly, we must consider the merits of the challenges to those provisions. *See Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 53 n. 2, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006) ("[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement."). However, as we will also explain, we find that no Plaintiff has standing to challenge the IIRAO's private cause of action. Accordingly, review of

the legality of that provision must await a challenge by a plaintiff who can establish an Article III injury.

A. General Principles of Standing

The irreducible minimum of any standing inquiry derives directly from Article III of the United States Constitution. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Article III limits the jurisdiction of federal courts to "Cases" and "Controversies." U.S. Const. art. III, § 2; *see also Lujan,* 504 U.S. at 559-60, 112 S.Ct. 2130. The judicial power established by Article III is therefore not "an unconditioned authority to determine the constitutionality of legislative or executive acts." *Hein v. Freedom From Religion Found., Inc.,* 551 U.S. 587, 598, 127 S.Ct. 2553, 168 L.Ed.2d 424 (2007) (internal quotation marks omitted). Rather, federal courts are permitted to address these questions only if actually adjudicating "the rights of individuals." *Id.* (internal quotation marks omitted). Thus, the inquiry into standing must focus on whether a claim is being brought "by a party whose interests entitle him to raise it." *Id.* (internal quotation marks omitted). A plaintiff's "interests" satisfy Article III when the following three elements are present:

> First, the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the

> injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan, 504 U.S. at 560-61, 112 S.Ct. 2130 (internal citations, quotation marks, and alterations omitted).

In addition to these constitutionally required elements of standing, federal courts have developed a body of self-imposed limitations on the exercise of their judicial power. *See Elk Grove Unified Sch. Dist. v. Newdow,* 542 U.S. 1, 11, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004); *see also Oxford Assocs. v. Waste Sys. Auth.,* 271 F.3d 140, 145 (3d Cir.2001). Accordingly, "[e]ven in cases concededly within our jurisdiction under Article III," we will decline to decide the merits of a case when these "prudential standing" requirements are not satisfied. *Elk Grove Unified Sch. Dist.,* 542 U.S. at 11, 124 S.Ct. 2301. Prudential standing encompasses: "the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Allen v. Wright,* 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984).

An organization wishing to bring suit on behalf of its members must satisfy a specific combination of constitutional and prudential standing requirements. *See United Food and Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 556-57, 116 S.Ct. 1529, 134 L.Ed.2d 758 (1996) (explaining that the first two prongs of the associational standing test are constitutional, while the third prong is prudential). To establish that it has "associational standing" and can represent its members' interests in federal court, an organization must show that:

> (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977).

Here, Plaintiffs claim that Lozano and the HHBA have standing to challenge the employment provisions of the IIRAO, and that Lozano, the HHBA, and the Doe Plaintiffs have standing to challenge the housing provisions of the IIRAO and the RO.

B. Constitutional Standing

1. The Employment Provisions

As discussed above, the IIRAO's employment provisions require businesses to submit affidavits

affirming that they do not utilize the services of unlawful workers; incentivize, and in certain circumstances mandate, the use of E-Verify; create procedures for adjudicating independently of federal law whether a business has employed an unauthorized alien; and penalize a business for doing so by suspending its business license.

The district court held that Lozano had standing to challenge these provisions for himself, and that the HHBA had standing to challenge them on behalf of its member, Rudolfo Espinal.[14] Lozano is a landlord, and Espinal is a landlord and owner of a real estate agency. Both are business entities under the IIRAO,[15]

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[14] Assuming the other requirements of associational standing are met, one member with standing is sufficient for an organization to have standing. *See Hunt*, 432 U.S. at 342, 97 S.Ct. 2434 ("[A]n association may have standing solely as the representative of its members. . . . The association must allege that its members, *or any one of them*, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit.") (alteration in original) (internal quotation marks omitted) (emphasis added).

[15] The employment provisions of the IIRAO regulate the behavior of all "business entities," a term which as we noted above, is defined expansively and includes even those entities that do not have or need business licenses. At the same time, compliance with these provisions is primarily, although not entirely, coerced through regulating the provision of business licenses. Lozano and Espinal are plainly business entities under the IIRAO; however, neither has testified as to whether he has a business license.

We agree with the Court of Appeals for the Eighth Circuit when faced with the same issue in *Gray v. City of Valley Park*,

(Continued on following page)

and both sometimes hire contractors to perform work on their rental properties. Accordingly, the district court found that they faced imminent concrete injury, because if the IIRAO were enforced, they would be compelled "to comply with [its] employer requirements . . . adding a burden of time and expense to [their] operations." *See Lozano*, 496 F.Supp.2d at 489. Hazleton challenges the district court's conclusion on several grounds.

Hazleton's primary argument on appeal is that the "injury" these Plaintiffs face is nothing more than the "cost of compliance" with the IIRAO, and that this is a generalized burden insufficiently particularized to satisfy the injury-in-fact requirement of Article III. It is well-established that an injury must be particularized to support standing. A "particularized" injury is one that "affect[s] the plaintiff in a personal and individual way," *Alston v. Countrywide Fin. Corp.*, 585 F.3d 753, 763 (3d Cir.2009) (quoting *Lujan*, 504 U.S. at 560 n. 1, 112 S.Ct. 2130) (internal quotation

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567 F.3d 976 (8th Cir.2009), that this does not deprive them of standing. Regardless of whether these Plaintiffs have business licenses, the IIRAO applies to them as business entities, and they "must, as law-abiding citizens, comply and conform their conduct according to [the ordinance's] directives." *Id.* at 985; *see also id.* at 986 ("At the very least, as a business entity covered by the ordinance, [plaintiffs] may not knowingly recruit, hire for employment, or continue to employ, an unlawful worker to perform work within the City. And, when a valid complaint is lodged, [plaintiffs] would be required to . . . provide identity information to the . . . Code Enforcement Office.") (internal citation omitted).

marks omitted), and is established when a plaintiff shows that s/he has "sustained or is immediately in danger of sustaining some direct injury . . . and not merely that [s/]he suffers in some indefinite way in common with people generally," *Ams. United for Separation of Church & State v. Reagan*, 786 F.2d 194, 199 (3d Cir.1986) (internal quotation marks omitted).

Thus, the Supreme Court has rejected attempts by taxpayers to bring suits challenging the government's use of tax dollars. For instance, in *Frothingham v. Mellon*, 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078 (1923), the Supreme Court held that a taxpayer lacked standing to challenge a federal appropriations act that she alleged violated the Tenth Amendment. The Court explained that the harm a taxpayer suffers when the government unlawfully uses taxpayer funds is "shared with millions of others [and] comparatively minute and indeterminable." *Id.* at 487, 43 S.Ct. 597. Because such an injury is a matter "of public and not of individual concern," it is not particularized, and therefore insufficient to give rise to Article III standing. *Id.* The Court has reaffirmed this conclusion many times since, explaining that:

> a plaintiff raising only a generally available grievance about government – claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the

> public at large – does not state an Article III case or controversy.

Lujan, 504 U.S. at 573-74, 112 S.Ct. 2130.

Hazleton attempts to transpose these principles into a quite different context. Hazleton suggests that because all business entities in Hazleton are required to comply with the IIRAO, the burden of complying with the ordinance is "generalized" and not "particularized." Accordingly, it argues that Lozano and Espinal – and presumably all business entities in Hazleton – lack standing to challenge the IIRAO's provisions affecting them. The argument could not be more misguided.

Plaintiffs here are not members of the general public complaining of some indefinite and indeterminable harm, such as the unconstitutional expenditure of their tax-dollars. Rather, Lozano and Espinal are direct targets of an ordinance they allege to be unconstitutional, complaining of what that ordinance would compel them to do. Thus, the appropriate comparison is not to taxpayers seeking invalidation of government expenditures, but to taxpayers seeking invalidation of taxes imposed on them. As the Supreme Court explained in *Hein*, 551 U.S. at 599, 127 S.Ct. 2553, it is incontrovertible that taxpayers in this second category have standing: "[o]f course, a taxpayer has standing to challenge the *collection* of a specific tax assessment as unconstitutional; being forced to pay such a tax causes a real and immediate economic injury to the individual taxpayer."

Furthermore, Hazleton's insistence that these Plaintiffs lack standing because their injuries are widely-shared (at least among business entities in Hazleton) is misplaced. The fact that an injury is widely-shared is not the primary focus of the particularized inquiry. *See Fed. Election Comm'n v. Akins*, 524 U.S. 11, 23-24, 118 S.Ct. 1777, 141 L.Ed.2d 10 (1998). As the Supreme Court explained in *United States v. Students Challenging Regulatory Agency Procedures ("SCRAP")*, 412 U.S. 669, 688, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973), "[t]o deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody. We cannot accept this conclusion." The question of particularity turns on the nature of the harm, not on the total number of persons affected.

Lozano and Espinal will not suffer in some "indefinite way in common with people generally" if the IIRAO is enforced. *Frothingham*, 262 U.S. at 488, 43 S.Ct. 597. Rather, they will be affected in a "personal and individual way" by what the IIRAO requires of them. *Lujan*, 504 U.S. at 561 n. 1, 112 S.Ct. 2130. Enforcement of the IIRAO would create coercive pressures compelling them to investigate the work authorization status of the prospective contractors they seek to hire. Additionally, they would be required to submit affidavits to Hazleton's Code Enforcement Office affirming that they do not knowingly utilize the services of "unlawful workers."

Failure to comply with either directive could result in significant sanctions. These costly requirements, imposed directly and purposefully on these Plaintiffs, are a particularized injury-in-fact.

Hazleton also argues that even if the "cost of compliance" is a theoretically sufficient injury under Article III, these Plaintiffs fail to show that the cost of compliance with the IIRAO is greater than the cost of compliance with federal law. Thus, argues Hazleton, these Plaintiffs fail to show that there would be any actual cost of compliance with the IIRAO itself. Hazleton is mistaken. Federal law certainly does not require anyone to submit an affidavit to Hazleton's Code Enforcement Office. Though relatively small, that cost is sufficient for standing purposes. "[A]n identifiable trifle is enough for standing." *See SCRAP*, 412 U.S. at 689 n. 14, 93 S.Ct. 2405 (internal quotation marks omitted).

The IIRAO is also much broader than federal law, and coerces as well as incentivizes different behaviors. Lozano and Espinal testified that they only hire workers to perform discrete repair projects on their rental properties as needed. *See* J.A. 1116, 1122 (Lozano has "problems with [his] roof" and intends to hire "a contractor" to make repairs.); J.A. 1216, 1221 (Espinal intends to hire someone to do "plumbing" and "electrical" repairs as part of the ongoing renovations of his rental properties. He also anticipates hiring someone for tasks such as "shoveling snow."). Such workers would almost certainly be considered independent contractors under federal

law. As we discuss in greater detail below, the federal requirement that employers verify the work authorization status of their employees does not apply to independent contractors. Thus, federal law would not require either Lozano or Espinal to determine such persons' work authorization status. In contrast, the IIRAO prohibits Plaintiff business owners from "permit[ting], dispatch[ing], or instruct[ing] any person who is an unlawful worker to perform work" (regardless of whether the person is an employee or an independent contractor), and thus compels them to verify the work authorization of any worker whose services they utilize. IIRAO § 4A; *see also* J.A. 1444. Therefore, we reject Hazleton's attempt to refute the standing of Lozano and Espinal by arguing that the IIRAO imposes no burdens beyond those imposed by federal law. It clearly does.

Lozano and Espinal have established that if the IIRAO is enforced, it will cause them particularized injury redressable by this court. Since the employment provisions of the IIRAO apply to independent contractors, Lozano and Espinal (and therefore the HHBA) have standing to challenge those provisions. However, it is much less clear whether the private cause of action applies to independent contractors, and we must separately evaluate whether Lozano or Espinal have standing to challenge that provision

2. Private Cause of Action

Unlike the other employment provisions of the IIRAO, which impose restrictions on a business entity not only when it "hire[s] for employment, or continue[s] to employ" an employee, but also whenever it "permit[s], dispatch [es], or instruct[s] any person . . . to perform work," IIRAO § 4A, the private cause of action on its face affords rights only to an "aggrieved *employee*." IIRAO § 4E (emphasis added). Under Section 4E of the IIRAO, it is an "unfair business practice" for a business entity to terminate "any employee who is not an unlawful worker" while it continues to employ an unlawful worker. *Id.* If it does so, the business entity is liable to the "aggrieved employee" for treble damages. *Id.* Whereas the rest of the IIRAO speaks of "workers," the section creating the private cause of action appears to inure solely to the benefit of "employees."

Lozano and Espinal have not testified that they currently employ anyone who would be considered an "employee," nor has either testified about any intent to do so. Moreover, even if they had – or even if we were to construe this section as also inuring to the benefit of discharged independent contractors – Lozano and Espinal have not testified that they have plans to hire *more than one* person, employee or contractor, at any one time, and the record is insufficient to support such a finding. Yet, the IIRAO's private cause of action arises only if at least two persons work for the same business entity at the same time. Additionally, unlike other provisions they

testified about, Lozano and Espinal did not testify that they fear prosecution under the private cause of action provision or that they have any reason to fear such prosecution.

We realize, of course, that the threat of future prosecution can certainly be a sufficiently "imminent" injury to support Article III standing. *See Pa. v. W.Va.*, 262 U.S. 553, 593, 43 S.Ct. 658, 67 L.Ed. 1117 (1923) ("One does not have to await the consummation of threatened injury to obtain preventive relief."). However, that threat must be more than a possibility dependent on multiple contingencies that may never occur. *See, e.g., Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 675 (9th Cir.1988) (explaining that fears of liability reliant on multiple contingencies do not give a plaintiff standing). Lozano and Espinal would be injured by Section 4E of the IIRAO only if they proceeded to hire multiple employees, terminated one while retaining another, and were sued by (or had reason to fear suit by) the terminated employee. This attenuated sequence of events is not even suggested by this record, and it is therefore too tenuous to support a conclusion that either has the requisite personal interest to establish a "case" or "controversy." Accordingly, we conclude that the district court lacked jurisdiction to consider the merits of these Plaintiffs' challenges to the IIRAO's private cause of action.

3. Housing Provisions

The housing provisions of the IIRAO prohibit the knowing or reckless harboring of "illegal aliens" (defined to include the knowing or reckless provision of rental housing); subject landlords who violate this prohibition to significant monetary sanctions; and invalidate any lease entered into by persons lacking lawful immigration status. The RO requires all persons over the age of eighteen who seek to live in rented property to obtain an occupancy permit; makes possession of documentation of lawful immigration status a requirement for receiving that permit; prohibits landlords from renting to persons who lack a permit; and subjects landlords who do so to suspension of their rental license and a concomitant prohibition on collecting rent from the dwelling units involved.

The district court held that Lozano, the HHBA (again on behalf of its member Espinal), and the Doe Plaintiffs have standing as landlords and tenants to challenge the housing provisions of the IIRAO and the RO.

a. Landlord Plaintiffs

The district court concluded that landlords Lozano and Espinal had suffered a constitutionally sufficient injury-in-fact because the housing provisions made it more difficult for them to rent apartments. The court also concluded they had standing because Hazleton's enforcement of the housing

provisions would directly impose certain requirements on them, costing them both time and money. *See Lozano*, 496 F.Supp.2d at 488-89. Hazleton contests the court's conclusions on several grounds.

Hazleton first argues that the record fails to support the district court's finding that the housing provisions made it more difficult for Lozano and Espinal to rent their properties. According to Hazleton, the record reveals that the landlords had the same "mixed success" in renting apartments both before and after passage of the ordinances. Hazleton's Br. 23. Hazleton therefore claims that Lozano and Espinal have suffered no injury at all. We cannot agree.

The district court's finding that both Lozano and Espinal had more difficulty finding tenants for their properties following passage of the IIRAO and the RO is supported by the record, and certainly not clearly erroneous. Lozano testified that tenants who had been renting from him since he acquired his rental property in 2005 "ran away" upon learning about the ordinances in mid-2006. J.A. 1108. Lozano further testified that he has been able to find tenants only sporadically since then, and that at least one prospective tenant, who had been quite interested in an apartment, reacted with concern and quickly departed after Lozano informed him about the requirements of the IIRAO and the RO. J.A. 1111-12. Espinal similarly testified that he has had more difficulty in renting apartments since passage of the ordinances, and that on at least one occasion, he showed an

apartment to potential tenants, who "were going to take [it]," but after telling these applicants about the ordinances, "they never called [him] back." J.A. 1215. The record therefore supports the district court's conclusion that Lozano and Espinal suffered sufficient injury to establish Article III standing.

Hazleton next argues that even if Lozano and Espinal did lose tenants and rental income because of these ordinances, such an injury is not "legally cognizable" because landlords have no right to rent to illegal aliens. Hazleton makes the rather hyperbolic metaphor of comparing these Plaintiffs to "drug dealers" asserting a claim to the proceeds of their unlawful activity. The City states: "[j]ust as a drug dealer has no legally-cognizable interest in income derived from violations of federal drug laws, a landlord has no legally-cognizable interest in income derived from continuing violations of federal immigration law." Hazleton's Br. 24. Hazleton's comparison is as regrettable as it is unsound.

It is unfortunate that we must point out that there is no evidence in the record that the prospective tenants who chose not to rent from Plaintiffs were here unlawfully, as Hazleton's argument presumes. There are certainly other reasons why such invasive ordinances might dissuade a prospective tenant from renting in Hazleton. However, even if we were to assume that all deterred tenants were here unlawfully, we would still conclude that Plaintiffs assert an injury cognizable under the law.

By comparing landlords to persons who sell drugs in direct contravention of federal law, Hazleton distorts both the applicable law and the interests these Plaintiffs assert. Federal law simply does not prohibit landlords from renting (in the ordinary course of business) to persons who lack lawful immigration status. Nor does federal law directly prohibit persons lacking lawful status from renting apartments. As we discuss in further detail below, there is a federal prohibition against "harboring" of aliens lacking lawful presence. However, this prohibition is not nearly so broad as Hazleton's, and has never been held to apply to a landlord who does nothing more than rent to a tenant who happens to be here unlawfully. In light of these realities, we think the interest that these Plaintiffs assert is more appropriately characterized as an interest in continuing to operate their rental businesses consistent with the less costly mandates of federal law, and that is an interest which supports Article III standing.

Hazleton also argues that these Plaintiffs fail to establish that the IIRAO and the RO caused whatever injury they have suffered because actions of independent third-parties (the potential tenants) are responsible for that injury, not the ordinances themselves. Hazleton draws its argument from the discussion of causation in *Lujan*. There, the Supreme Court explained that when the "plaintiff is himself an object" of a challenged government action, "there is ordinarily little question that the action . . . has caused him injury, and that a judgment . . . will

redress it." *Lujan,* 504 U.S. at 561-62, 112 S.Ct. 2130. However, when

> a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else,* much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction – and perhaps on the response of others as well. . . . Thus, when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish.

Lujan, 504 U.S. at 562, 112 S.Ct. 2130 (internal quotation marks omitted). Hazleton contends that the landlord Plaintiffs cannot satisfy this higher burden.

In *Pitt News v. Fisher,* 215 F.3d 354 (3d Cir.2000), we discussed when the regulation of a third-party "causes" a plaintiff's injury for the purposes of Article III. There, Pennsylvania had amended its Liquor Code to impose criminal sanctions on businesses that advertised alcoholic beverages in publications directed at educational institutions. The Pitt News, a student-run newspaper at the University of Pittsburgh, sued to enjoin enforcement of this amendment, and asserted standing based on the fact that its advertising revenues had suffered because of advertisers' compliance with the law. The district court held that "indirect economic effects resulting from a

regulation aimed at third parties" were insufficient to give The Pitt News standing. *Id.* at 358.

In reversing that ruling, we explained that the advertisers would not have cancelled their contracts with The Pitt News were it not for the regulation. The fact that advertisers would cancel their contracts, thereby reducing advertising revenues, "was not only reasonably foreseeable when the Commonwealth decided to enact and enforce [the Act], it was the very goal of the statute." *Id.* at 361 (internal citation omitted). Accordingly, we concluded that the injury the newspaper suffered was "fairly traceable" to enforcement of the statute against its advertisers.

The situation in *Pitt News* is analogous to the situation here. The housing provisions of the IIRAO and the RO have already deterred certain renters from contracting for housing with Lozano and Espinal, and these ordinances will continue to deter other renters if they are enforced. This deterrence "was not only reasonably foreseeable" when Hazleton enacted these ordinances, it was Hazleton's "very goal." *Id.* The injuries Lozano and Espinal assert are a direct, predictable, and anticipated consequence of the regulation. Accordingly, their injuries are "fairly traceable" to the ordinances.

Moreover, Hazleton's argument ignores that Lozano and Espinal are not just directly impacted by the ordinances, but directly regulated as well. The housing provisions of the IIRAO and the RO regulate *both* tenants and landlords. Although the injury on

which Hazleton focuses, the injury of lost rental income, is caused by the requirements imposed on tenants, the district court found, and we certainly agree, that these landlords would be equally injured by the requirements the IIRAO and the RO impose on them. Thus, even if we agreed with all of Hazleton's arguments thus far, we would still conclude that Lozano and Espinal have standing. The housing provisions of the IIRAO and the RO regulate the ability of landlords to contract with certain persons. They require landlords to explain the ordinances to all prospective renters and to examine those renters' occupancy permits. More generally, they compel landlords to act as local enforcers of immigration law in ways that far exceed their obligations under federal law. Compliance with these requirements elevates the cost of doing business as a landlord, and that alone gives them Article III standing.[16]

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[16] We note, however, that the RO explicitly exempts from its registration and license requirements those "[p]roperties which consist of a double home, half of which is let for occupancy and half of which is Owner-occupied as the Owner's residence." RO § 11d. At trial, Lozano testified that he owns a "two-family" home. J.A. 1107. He lives in one unit with his family, and rents out the other unit, which is subdivided into two separate apartments, to help him pay the mortgage. *See* J.A. 1107-08. To our knowledge, the parties have not raised whether the "double home" exception applies to Lozano, and the district court did not address the issue. If that exception does apply, Lozano could not establish a sufficient injury to challenge the RO. *See Addiction Specialists, Inc. v. Twp. of Hampton*, 411 F.3d 399, 405 (3d Cir.2005) (explaining that because standing is a jurisdictional issue, it cannot be waived, and the court must, when necessary,

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b. Tenant Plaintiffs

Because "[t]he loss (or imminent loss) of one's apartment and the inability to rent a new one is certainly an actual and concrete injury," caused by the ordinances and redressable by the court, the district court concluded that the Doe Plaintiffs, who lack lawful immigration status, also have standing to challenge the housing provisions of the IIRAO and the RO. *Lozano,* 496 F.Supp.2d at 497-98.

Hazleton first argues that the district court erred in finding that John Does 3 and 7 and Jane Doe 5 face imminent injury. According to Hazleton, their fears of eviction are merely conjectural because "none of them have been evicted or have received any threat or warning that they might be evicted in the future."[17] Hazleton's Br. 20. We are entirely unconvinced.

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consider it *sua sponte*). However, even assuming that Lozano is exempt from the RO, other Plaintiffs would still have standing to challenge that ordinance, and we therefore would still have jurisdiction to review it.

[17] Hazleton does not extend this argument to John Doe 1, which is wise since John Doe 1 was evicted by his landlord because of these ordinances. *See* J.A. 831-32. Hazleton does challenge John Doe 1's standing, however, based on its contention that John Doe 1 is lawfully present in this country. We recognize that the record contains conflicting testimony as to John Doe 1's immigration status. On the one hand, John Doe 1 testified that his father, a United States citizen, submitted a "petition" to make John Doe 1 a "legal resident," and that the United States government approved that petition. J.A. 808-09. On the other hand, John Doe 1 testified that he is unsure of his immigration status and his work authorization, that he believes

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These Plaintiffs all testified that they feared losing their apartments and having to move elsewhere. *See* J.A. 888, 929, 951. Hazleton cites John Doe 3's testimony that he did not expect to be evicted because his landlord "doesn't care much about" the ordinances, J.A. 888, as evidence that he faces no imminent injury. However, Hazleton misconstrues this testimony. John Doe 3 later explained that he had been told by his landlord's agent that his landlord did not expect the ordinances to ever go into effect, and for that reason, John Doe 3 had been unconcerned. *See* J.A. 889-90. He also testified that he has no reason to believe that his landlord would not comply with the ordinances if they are enforced. J.A. 889-90. Given the harsh sanctions the IIRAO and the RO would impose on any landlord who rented to him or the other Doe Plaintiffs, such fears are plainly well-founded. The possibility of eviction is therefore much more than "conjecture." A plaintiff need only show "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement," and the Doe Plaintiffs clearly do so.

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he is removable, and that he is "not here legally." *See* J.A. 809-10, 832. We therefore cannot conclude that the district court's findings as to the legitimacy of his fears were clearly erroneous. Regardless of John Doe 1's precise legal status, we think that he has established standing. He has been evicted because of the ordinances, and his own understanding of-and his ability to prove-his status is sufficiently uncertain that he is quite likely to suffer further injury if the ordinances are enforced.

Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979).

Hazleton also raises here the converse of its argument above: it contends that the Doe Plaintiffs lack standing because their claimed injuries would be caused by third-party landlords, and not the ordinances. This verges on the ridiculous. Just as Hazleton's ordinances compel tenants not to rent from Plaintiff landlords, they compel landlords not to rent to Plaintiff tenants. The Doe Plaintiffs' fears that their landlords will not rent to them – because the IIRAO and the RO *require* those landlords not rent to them – are certainly "fairly traceable" to the ordinances. Additionally, as Hazleton well knows, these ordinances directly regulate tenants as well, and therefore would injure the Doe Plaintiffs regardless of their landlords' reactions to them. The IIRAO and the RO would invalidate their leases, and would require them to pay a fee and provide documentation (which they lack) in order to continue renting apartments in Hazleton. These injuries easily satisfy Article III.

Finally, Hazleton argues that the Doe Plaintiffs fail to establish redressability because, even if this Court struck down the ordinances, the Doe Plaintiffs would still be subject to removal. According to Hazleton, this Court cannot grant "a remedy that takes the Doe [P]laintiffs out of legal jeopardy. They will still be in violation of federal law and subject to removal." Hazleton's Br. 21. Hazleton greatly overstates the demands of this element of constitutional standing.

As the Supreme Court explained in *Larson v. Valente*, 456 U.S. 228, 243 n. 15, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982), "a plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury." Redressability therefore does not require that a court be able to solve all of a plaintiff's woes. Rather, we need only be able to redress, to some extent, the specific injury underlying the suit. *See Mass. v. EPA*, 549 U.S. 497, 526, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007) (holding that redressability prong was satisfied because risk of global climate change would be reduced "to some extent" by relief requested). By permanently enjoining enforcement of the housing provisions of the IIRAO and the RO, this court can provide meaningful redress for the injury the Doe Plaintiffs assert. Such relief would substantially decrease the likelihood that they will be evicted and/or unable to procure rental housing while they remain in the United States. That is more than sufficient to establish standing.

Because Lozano, HHBA member Espinal, and the Doe Plaintiffs will suffer injury caused by the ordinances and redressable by the court, we conclude that they have Article III standing to challenge the housing provisions of the IIRAO and the RO.

C. Prudential Standing

Even when a plaintiff satisfies Article III standing requirements, federal courts may nonetheless decline to consider that plaintiff's claims for prudential reasons. Hazleton contends that there are two prudential considerations which counsel restraint here.

Hazleton first argues that Plaintiffs lack prudential standing because they do not fall within the "zone of interests" protected by federal immigration law. Hazleton misstates the applicable zone of interests inquiry in the pre-emption context.

The Supreme Court has explained that a plaintiff may bring suit only when the interests s/he asserts are "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp,* 397 U.S. 150, 153, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970). This limitation on standing arose in suits challenging agency action under the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, but has since been employed more broadly. *See Bennett v. Spear,* 520 U.S. 154, 163, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) (The "zone-of-interests test [was first applied] to suits under the APA, but later cases have applied it also in suits not involving review of federal administrative action and have specifically listed it among other prudential standing requirements of general application.") (internal citations omitted). However, outside of the administrative law

context, the test may have different permutations, *see Conte Bros. Auto., Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 226 (3d Cir.1998), and "the breadth of the zone of interests [will vary] according to the provisions of law at issue," *Bennett*, 520 U.S. at 163, 117 S.Ct. 1154.

Thus, in the pre-emption context, we have explained that the relevant prudential inquiry is *not* whether a plaintiff's interests fall within the zone protected by the allegedly pre-empting federal provision, in this case, federal immigration law. In *St. Thomas-St. John Hotel & Tourism Ass'n v. Virgin Islands*, 218 F.3d 232 (3d Cir.2000), several employer organizations brought suit to enjoin a Virgin Islands law establishing that employees could only be terminated for cause. The plaintiffs alleged that this law was pre-empted by the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151-169. On appeal, defendants argued that plaintiffs lacked prudential standing to invoke the pre-emptive effect of the NLRA, because the NLRA's zone of interests did not encompass employers' interests in terminating their employees. We agreed with the defendants' characterization of the NLRA's zone of interests, but found this no bar to employers' prudential standing. We explained:

> We know of no governing authority to the effect that the federal statutory provision which allegedly pre-empts enforcement of local legislation by conflict must confer a right on the party that argues in favor of

> pre-emption. On the contrary, a state or territorial law can be unenforceable as pre-empted by federal law even when the federal law secures no individual substantive rights for the party arguing pre-emption.

Id. at 241.

Pre-emption suits arise under the Supremacy Clause and vindicate the interests of that Clause, not the interests of the pre-empting federal provision. Therefore, the appropriate prudential inquiry in pre-emption cases (if any such inquiry is necessary at all) must be whether the plaintiff's interests fall within the zone protected by the Supremacy Clause itself. *See, e.g., Wilderness Soc'y v. Kane Cnty.*, 581 F.3d 1198, 1217 n. 11 (10th Cir.2009) (declining to decide if zone of interests test applies in pre-emption cases, but emphasizing that if it does, "the relevant zone of interest is that of the Supremacy Clause and not of the allegedly pre-empting federal statute"); *Pharm. Research & Mfrs. v. Concannon,* 249 F.3d 66, 73 (1st Cir.2001) (In a pre-emption case, "it is the interests protected by the Supremacy Clause, not by the pre-empting statute, that are at issue."). These interests, which are no less than our society's interest in a working federalism, are societal, not individual. Accordingly, all Plaintiffs fall within their breadth, and have prudential standing here.

Hazleton also argues that we should, as a matter of prudential standing, refuse to adjudicate the Doe Plaintiffs' claims because they concede that they lack lawful immigration status. Hazleton relies on

National Coalition of Latino Clergy, Inc. v. Henry, No. 07-CV-613, 2007 WL 4390650 (N.D.Okla. Dec. 12, 2007), the unpublished decision of a lone federal district court as support for its contention.[18]

In *Henry*, the District Court for the Northern District of Oklahoma considered challenges to the Oklahoma Taxpayer and Citizen Protection Act of 2007, a law which mirrors the IIRAO in several respects (and which, in subsequently-filed litigation, *Chamber of Commerce v. Edmondson*, 594 F.3d 742 (10th Cir.2010), was preliminarily enjoined in part). The court concluded that those plaintiffs lacking lawful immigration status had Article III standing, but nonetheless held that it would not consider their claims for prudential reasons. Explaining that courts have traditionally refused to entertain cases brought by plaintiffs with "unclean hands," it reasoned that the "illegal alien Plaintiffs seek nothing more than to use this Court as a vehicle for their continued unlawful presence in this country." *Id.*, at *9. To allow them to do so, the court concluded, would make it an "abetter of iniquity," a result it found "unpalatable." *Id.* The court thus adopted "a new, and narrow, prudential limitation" on standing:

> [a]n illegal alien, in willful violation of federal immigration law, is without standing to

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[18] As a general rule, we do not consider arguments arising out of unpublished decisions, and do so here solely for the purposes of putting to bed Hazleton's argument, which we find particularly troubling.

> challenge the constitutionality of a state law, when compliance with federal law would absolve the illegal alien's constitutional dilemma – particularly when the challenged state law was enacted to discourage violation of the federal immigration law.

Id.

Hazleton argues that, for the reasons articulated in *Henry*, we "too must prudentially decline to take jurisdiction with respect to the Doe Appellees." Hazleton's Br. 19. *Henry*'s invented bar to judicial access is entirely improper, and we will not accept Hazleton's invitation to duplicate that error here.

The *Henry* decision, both in substance and tone, fails to appreciate that whatever a person's immigration status, "an alien is surely a 'person'" entitled to Due Process Clause protections. *Plyler*, 457 U.S. at 210, 102 S.Ct. 2382; *see also Wolff v. McDonnell*, 418 U.S. 539, 579, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) ("The right of access to the courts . . . is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights."). The Supreme Court therefore has certainly considered judicial challenges brought by persons lacking lawful immigration status, *see, e.g.*, *Plyler*, even when "compliance with federal law" would have absolved "the illegal alien's constitutional dilemma," *Henry*, 2007 WL 4390650, at *9.

Henry defends its rule by claiming that it would not deny persons without lawful status *all* access to the courts, as they would retain prudential standing to sue for harms *unrelated* to their status. But this caveat assures little. As this case demonstrates, all it takes for a harm to become "related to" a person's immigration status is for some legislative body to decree it so. The scope of these aliens' rights would therefore, under *Henry*'s reasoning, be entirely dependent on the will of state and local legislatures, which could tie any consequence of their choosing to unlawful status and never face judicial review.

The Doe Plaintiffs satisfy Article III standing requirements, and the prudential standing requirements of general applicability set forth by the Supreme Court. Accordingly, we will address their claims. However, two more preliminary issues must be resolved before we do so.

V. ANONYMITY AND CONFIDENTIALITY

Hazleton argues that the district court erred in permitting those Plaintiffs lacking lawful immigration status to proceed using a "John Doe" or "Jane Doe" pseudonym. We disagree.

In *C.A.R.S. Protection Plus,* we explained that although "the use of pseudonyms to conceal a plaintiff's identity has no explicit sanction in the federal rules," the Supreme Court has "given the practice implicit recognition." 527 F.3d at 371 n. 2. We thus concluded that "the decision whether to allow a

plaintiff to proceed anonymously rests within the sound discretion of the court." *Id.*

In deciding whether to permit those Plaintiffs with concerns about the legality of their immigration status to proceed anonymously, the district court surveyed case law within this Circuit and identified nine separate factors courts have used to decide whether anonymity is appropriate. *See Lozano,* 496 F.Supp.2d at 506. The court then engaged in a thorough analysis of each of these factors, and concluded that the factors favoring anonymity outweighed those favoring disclosure. Specifically, the court found that ethnic tensions had escalated in Hazleton since enactment of the ordinances, and that the named Plaintiffs had been harassed and intimidated for their involvement in this litigation.[19] *See id.* at

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[19] Lozano, for example, testified that hate mail was sent to his home three separate times. One letter "contained a clipping from a newspaper describing the [alleged] effects of illegal immigration as well as a picture of a 'warrior' wearing 'a huge Mexican hat.' Scrawled near this picture were the phrases, '[s]ubhuman spic scum' and '[i]f it is brown, flush it down.'" *Lozano,* 496 F.Supp.2d at 510 (alterations in original) (internal quotation marks and citation omitted). This letter also contained a link to a website proclaiming itself "the Official Home Page of the National Socialist Movement, an organization dedicated to the preservation of our Proud Aryan Heritage, and the creation of a National Socialist Society in America and around the world." *Id.* at 510 n. 34 (internal quotation marks omitted). The district court noted that this sort of harassment extended even to people who were merely perceived as being connected to the lawsuit, even if this perception was not rooted in fact. Amilcar Arroyo, a United States citizen who publishes a Hazleton-based

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508-10. The court concluded that the Doe Plaintiffs, because of their unlawful status, would face an "exponentially greater" risk of harassment, and even physical danger, if their identities were revealed. *Id.* at 510. The court also noted that the litigation was in the public interest, and reasoned that the Doe Plaintiffs, as well as prospective litigants lacking lawful status, would be deterred from bringing cases clarifying constitutional rights, if doing so required alerting federal immigration authorities to their presence. *See id.* at 511-12. Finally, the court explained that because the Doe Plaintiffs' identity information was not central to their claims, restricting Hazleton's access to that information would not be prejudicial. *See id.* at 513. We agree with each of these conclusions, and think it clear that given the environment in Hazleton following enactment of these ordinances, the court did not abuse its discretion in permitting the Doe Plaintiffs to proceed using pseudonyms.

Relatedly, Hazleton also argues that the district court violated 8 U.S.C. § 1373(a) by entering an order prohibiting the parties from disclosing "information obtained during discovery regarding the John and

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Spanish-language newspaper, was publically harassed when he tried to cover a rally in support of the ordinances. Based on a rumor that he was a plaintiff in this suit, rally participants gathered around him shouting, "get out of the country" and "traitor." *Id.* at 510 (internal quotation marks omitted). Police escorted Arroyo from the rally for his own protection. *Id.*

Jane Doe plaintiffs." J.A. 211. Section 1373(a) provides:

> Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

8 U.S.C. § 1373(a). Hazleton argues that because the district court is an entity of the federal government, it was prohibited by this section from preventing Hazleton from communicating with federal immigration authorities about "the citizenship or immigration status" of the Doe Plaintiffs.

Although we are not convinced that § 1373(a) does, or could, limit the inherent powers of federal courts in the way Hazleton suggests, we need not reach this question because Hazleton's argument fails for a more fundamental reason. Under the confidentiality agreement the parties eventually entered into, the Doe Plaintiffs agreed to reveal their identities only to Hazleton's attorneys, and not to Hazleton officials. *See* J.A. 692-707. Consequently, Hazleton never learned these Plaintiffs' identities or their immigration status. The district court simply could not have prohibited Hazleton from communicating with the federal government about information that Hazleton never knew.

VI. DISCUSSION

Having resolved these preliminary issues, we can turn to the merits of the claims before us. Although our reasoning differs from that of the district court, we agree that the provisions of the ordinances which we have jurisdiction to review are pre-empted by federal immigration law and unconstitutional under the Supremacy Clause. Because that conclusion turns on the relationship between the ordinances and federal immigration law, we begin our inquiry into the merits of this appeal by briefly laying out the parameters of that law.

A. Federal Immigration Law

1. The Immigration and Nationality Act

The primary body of federal immigration law is contained in the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101-537, enacted in 1952, and amended many times thereafter. The INA sets forth the criteria by which "aliens," defined as "any person not a citizen or a national of the United States," 8 U.S.C. § 1101(a)(3), may enter, visit, and reside in this country.

Under the INA, there are three primary categories of aliens who may lawfully enter and/or spend time within the United States: (1) "nonimmigrants," who are persons admitted for a limited purpose and for a limited amount of time, such as visitors for pleasure, students, diplomats, and temporary workers,

see 8 U.S.C. § 1101(a)(15); (2) "immigrants," who are persons admitted as (or after admission, become) lawful permanent residents of the United States based on, *inter alia,* family, employment, or diversity characteristics, *see* 8 U.S.C. § 1151; and (3) "refugees" and "asylees," who are persons admitted to and permitted to stay for some time in the United States because of humanitarian concerns, *see* 8 U.S.C. §§ 1157-58.[20] Aliens wishing to be legally admitted into the United States must satisfy specific eligibility criteria in one of these categories, and also not be barred by other provisions of federal law that determine inadmissibility. Congress has determined that non-citizens who, *inter alia,* have certain health conditions, have been convicted of certain crimes, present security concerns, or have been recently removed from the United States, are inadmissible, *see* 8 U.S.C. § 1182, and if detained when attempting to enter or reenter the country, may be subject to expedited removal, *see* 8 U.S.C. § 1225.

Despite the carefully designed system for lawful entry described above, persons lacking lawful immigration status are obviously still present in the United States. As the Supreme Court explained

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[20] Congress has also ratified treaties pursuant to which persons may be admitted on humanitarian grounds even if they do not satisfy the statutory definition of "refugee" set forth in the INA. *See* United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, Apr. 18, 1988, 1465 U.N.T.S. 85.

almost thirty years ago: "[s]heer incapability or lax enforcement of the laws barring entry into this country . . . has resulted in the creation of a substantial 'shadow population' . . . within our borders." *Plyler*, 457 U.S. at 218, 102 S.Ct. 2382. Such persons may lack lawful status because they entered the United States illegally, either by failing to register with immigration authorities or by failing to disclose information that would have rendered them inadmissible when they entered. *See* 8 U.S.C. § 1227. In addition, aliens who entered legally may thereafter lose lawful status, either by failing to adhere to a condition of admission, or by committing prohibited acts (such as certain criminal offenses) after being admitted. *See id.*

Persons here unlawfully are subject to removal from the country. Removal proceedings are initiated at the discretion of the Department of Homeland Security ("DHS").[21] *See Juarez v. Holder*, 599 F.3d 560,

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[21] Prior to 2003, the Immigration and Naturalization Service ("INS"), which operated under the Department of Justice, administrated both immigration services and immigration enforcement. On March 1, 2003, Congress abolished the INS. Pursuant to the Homeland Security Act of 2002, Pub.L. No. 107-296, 116 Stat. 2135, that agency's functions were transferred to three separate agencies within the newly created Department of Homeland Security: U.S. Citizenship and Immigration Services ("USCIS"), which performs immigration and naturalization services, U.S. Immigration and Customs Enforcement ("ICE"), which enforces federal immigration and customs laws, and U.S. Customs and Border Protection ("CBP"), which monitors and secures the country's borders. Older documents may continue to

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566 (7th Cir.2010) ("[T]he decision when to initiate removal proceedings is committed to the discretion of immigration authorities." (citing *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489, 119 S.Ct. 936, 142 L.Ed.2d 940 (1999))). Although certain aliens are subject to more expedited removal proceedings,[22] for all others, section 240 of the INA sets forth the "sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States." 8 U.S.C. § 1229a(a)(3).

Under section 240, an alien facing removal is entitled to a hearing before an immigration judge and is provided numerous procedural protections during that hearing, including notice, the opportunity to present and examine evidence, and the opportunity to be represented by counsel (at the alien's expense). *See* 8 U.S.C. § 1229a. At the conclusion of a removal hearing, the presiding immigration judge must decide, based on the evidence produced during the hearing, whether the alien is removable, *see* 8 U.S.C. § 1229a(c)(1)(A), and if so, whether s/he should be

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refer to the pre-2003 administrative structure, and citations to them should be understood in that context.

[22] As noted above, inadmissible aliens detained at the borders of the United States, or others deemed not to have been "admitted" to the country, may be subject to expedited removal. *See* 8 U.S.C. § 1225. In addition, expedited removal procedures apply to certain aliens already within the country who have been convicted of congressionally-defined crimes. *See* 8 U.S.C. § 1228

ordered removed, or should be afforded relief from removal. Such relief can include postponement of removal, cancellation of removal, or even adjustment of status to that of lawful permanent resident. *See* 8 U.S.C. §§ 1229a(c)(4), 1229b.

In sum, while any alien who is in the United States unlawfully faces the prospect of removal proceedings being initiated against her/him, whether s/he will actually be ordered removed is never a certainty until all legal proceedings have concluded. Moreover, even after an order of removal issues, the possibility remains that no country will accept the alien. Under such circumstances, the Constitution limits the government's authority to detain someone in anticipation of removal if there is no significant likelihood of removal in the reasonably foreseeable future. *See Zadvydas v. Davis*, 533 U.S. 678, 699, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001).[23]

The INA, as amended, also prohibits the "harboring" of aliens lacking lawful immigration status. It provides that any person who "knowing or in reckless disregard of the fact that an alien has come to,

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[23] In *Zadvydas*, the Court addressed the cases of two aliens who had been ordered removed from the United States, but who, for various reasons, no other country would accept. The government sought to continue detaining them nonetheless. The Court held that the Due Process Clause imposed reasonableness limits on post-removal-period detention, and thus that the government could not continue the aliens' detention indefinitely if there was "no significant likelihood of removal in the reasonably foreseeable future." 533 U.S. at 701, 121 S.Ct. 2491.

entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection . . . such alien in any place, including any building or any means or transportation" shall be subject to criminal penalties. 8 U.S.C. § 1324(a)(1)(A)(iii).

For decades, the INA contained no specific prohibition against the employment of aliens lacking legal status. Rather, regulation of the employment of aliens not lawfully present was at most a "peripheral concern." *DeCanas v. Bica,* 424 U.S. 351, 360, 96 S.Ct. 933, 47 L.Ed.2d 43 (1976). This changed in 1986, when Congress amended the INA through enactment of the Immigration Reform and Control Act ("IRCA"), Pub.L. No. 99-603, 100 Stat. 3359 (codified at 8 U.S.C. §§ 1324a-1324b). IRCA "forcefully made combating the employment of illegal aliens central to the policy of immigration law." *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board,* 535 U.S. 137, 147, 122 S.Ct. 1275, 152 L.Ed.2d 271 (2002) (internal quotation marks and alterations omitted).

2. The Immigration Reform and Control Act

IRCA regulates the employment of "unauthorized aliens," a term of art defined by the statute as those aliens neither "lawfully admitted for permanent residence" nor "authorized to be . . . employed by this chapter or by the Attorney General." 8 U.S.C. § 1324a(h)(3). IRCA makes it unlawful to knowingly hire or continue to employ an unauthorized alien, or

to hire anyone for employment without complying with the work authorization verification system created by the statute. 8 U.S.C. § 1324a(a)(1) (2). This verification system, often referred to as the "I-9 process," requires that an employer examine certain documents that establish both identity and employment authorization for new employees. *See* 8 U.S.C. § 1324a(b). The employer must then fill out an I-9 form attesting that s/he reviewed these documents, that they reasonably appear to be genuine, and that to the best of the employer's knowledge, the employee is authorized to work in the United States. *See id.* Although employers are required to verify the work authorization of all *employees*, Congress did not extend this requirement to independent contractors. *See* 8 U.S.C. § 1324a(a)(1) (making unlawful the knowing "employment" of an unauthorized alien, and the hiring of an employee for "employment" without verifying the employee's work authorization); 8 C.F.R. § 274a.1(f) (specifically excluding "independent contractors" from the definition of "employee"); 8 C.F.R. § 274a.1(g) (specifically excluding a "person or entity using . . . contract labor" from the definition of "employer").

The I-9 "verification system is critical to the IRCA regime." *Hoffman Plastic Compounds*, 535 U.S. at 147-48, 122 S.Ct. 1275. Not only is failure to use the system illegal, but use of the system provides an affirmative defense to a charge of knowingly employing an unauthorized alien. *See* 8 U.S.C. § 1324a(a)(3). Thus, employers who use the I-9 process in good faith

to verify the work authorization of employees are presumed not to have knowingly employed someone unauthorized to work in this country. In enacting IRCA, Congress required the President to monitor the security and efficacy of this verification system. *See* 8 U.S.C. § 1324a(d). Congress also imposed limits on the President's ability to change it. *Id.*

In addition to relying on the I-9 verification system, IRCA uses public monitoring, prosecution, and sanctions to deter employment of unauthorized aliens. IRCA provides for the creation of procedures through which members of the public may file complaints about potential violations; it authorizes immigration officers to investigate these complaints; and it creates a comprehensive hearing and appeals process through which complaints are evaluated and adjudicated by administrative law judges. *See* 8 U.S.C. § 1324a(e)(1)-(3).

Under IRCA, an employer who knowingly hires an unauthorized alien shall be ordered to cease and desist the violation, and to pay between $250 and $2000 per unauthorized alien for a first offense, between $2000 and $5000 per unauthorized alien for a second offense, and between $3000 and $10,000 per unauthorized alien for a third or greater offense. 8 U.S.C. § 1324a(e)(4). An employer who fails to verify the work authorization of its employees can be ordered to pay between $100 and $1000 for each person whose authorization it failed to authenticate. 8 U.S.C. § 1324a(e)(5). Employers who engage in a "pattern or practice" of hiring unauthorized aliens shall be fined

up to $3000 per unauthorized alien, imprisoned for not more than six months, or both. 8 U.S.C. § 1324a(f)(1).

IRCA expressly pre-empts states and localities from imposing additional "civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2).

Because of its concern that prohibiting the employment of unauthorized aliens might result in employment discrimination against authorized workers who appear to be foreign, Congress included significant anti-discrimination protections in IRCA. *See* 8 U.S.C. § 1324b.[24] The statute provides that, with certain limited exceptions, it is an "unfair immigration-related employment practice" to discriminate in hiring on the basis of national origin or

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[24] 8 U.S.C. § 1324b provides in relevant part that:

> [with certain limited exceptions, it] is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien, as defined in section 1324a(h)(3) of this title) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment-(A) because of such individual's national origin, or (B) in the case of a protected individual . . . because of such individual's citizenship status.

8 U.S.C. § 1324b(a). Any person adversely-affected by an unfair immigration-related employment practice "may file a charge respecting such practice or violation." 8 U.S.C. § 1324b(b)(1).

citizenship status. 8 U.S.C. § 1324b(a)(1). Congress put teeth into this provision by creating the office of a "Special Counsel" to investigate and prosecute such offenses, and it *required* that the President fill that position "with the advice and consent of the Senate." 8 U.S.C. § 1324b(c).[25] Congress also authorized immigration judges to punish those who violate IRCA's anti-discrimination mandate by imposing civil fines equivalent in amount to those imposed for knowingly hiring unauthorized aliens. *Compare* 8 U.S.C. § 1324a(e)(4)(A)(i)-(iii) *with* 8 U.S.C. § 1324b(g)(2)(B)(iv)(I)-(III).[26]

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[25] 8 U.S.C. § 1324b(c) provides in relevant part that "[t]he President shall appoint, by and with the advice and consent of the Senate, a Special Counsel for Immigration-Related Unfair Employment Practices." 8 U.S.C. § 1324b(c)(1). The Special Counsel "shall be responsible for investigation of charges and issuance of complaints under this section and in respect of the prosecution of all such complaints before administrative law judges." 8 U.S.C. § 1324b(c)(2).

[26] There are some differences between the two sections. The imposition of monetary sanctions under § 1324a is mandatory, but discretionary under § 1324b. *Compare* 8 U.S.C. § 1324a(e)(4)(A) *with* 8 U.S.C. § 1324b(g)(2)(B)(iv). Also, criminal penalties are available for certain pattern-or-practice violations under § 1324a, but not available under § 1324b. *See* 8 U.S.C. § 1324a(f)(1). In contrast, § 1324b provides for compensatory relief, such as backpay and other remedies, which is not available under § 1324a. *See* 8 U.S.C. § 1324b(g)(2)(B)(iii) and (vii)-(viii).

3. The Illegal Immigration Reform and Immigrant Responsibility Act

In 1996, Congress again amended the INA by enacting the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub.L. No. 104-208, 110 Stat. 3009 (codified as amended in various sections of 8 U.S.C.). In IIRIRA, Congress directed the Attorney General, and later the Secretary of Homeland Security, to conduct three "pilot programs of employment eligibility confirmation" in an attempt to improve upon the I-9 process. IIRIRA § 401(a), 110 Stat. 3009-655. Congress mandated that these programs be conducted on a trial basis, for a limited time period, and in a limited number of states. *See* IIRIRA § 401(b)-(c), 110 Stat. 3009-655-66. Two of these trial systems were discontinued in 2003. However, the third – originally known as the "Basic Pilot Program" but since renamed "E-Verify" – was reauthorized and expanded to all fifty states in 2003. *See* Basic Pilot Program Extension and Expansion Act of 2003, Pub.L. No. 108-156, §§ 2, 3, 117 Stat. 1944. It has been reauthorized several times since, and its current authorization will expire, absent congressional action, on September 30, 2012. *See* Department of Homeland Security Appropriations Act, 2010, Pub.L. No. 111-83, § 547, 123 Stat. 2177; Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Pub.L. No. 110-329, Div. A, § 143, 122 Stat. 3580.

E-Verify allows an employer to actually authenticate applicable documents rather than merely visually scan them for genuineness. When using E-Verify,

an employer enters information from an employee's documents into an internet-based computer program, and that information is then transmitted to the Social Security Administration and/or DHS for authentication. *See* IIRIRA, as amended, § 403(a)(3). These agencies confirm or tentatively nonconfirm whether the employee's documents are authentic, and whether the employee is authorized to work in the United States. *See* IIRIRA, as amended, § 403(a)(4). If a tentative nonconfirmation is issued, the employer must notify the employee, who may contest the result. *See id.* If an employee does not contest the tentative result within the statutorily prescribed period, the tentative nonconfirmation becomes a final nonconfirmation. *See id.* If the employee does contest it, the appropriate agencies undertake additional review and ultimately issue a final decision. *See id.* An employer may not take any adverse action against an employee until it receives a final nonconfirmation. *See id.* However, once a final nonconfirmation is received, an employer is expected to terminate the employee, or face sanctions.

With only a few exceptions, federal law makes the decision of whether to use E-Verify rather than the default I-9 process entirely voluntary. *See* IIRIRA, as amended, § 402(a). Federal government employers and certain employers previously found guilty of violating IRCA are currently required to use E-Verify; all other employers remain free to use the system of

their choice.[23] *See* IIRIRA, as amended, § 402(e). Significantly, in enacting IIRIRA, Congress specifically prohibited the Secretary of Homeland Security from requiring "any person or other entity to participate in [E-Verify]." *See* IIRIRA, as amended, § 402(a). Congress also directed the Secretary to publicize the "voluntary nature" of the program and to ensure that government representatives are available to "inform persons and other entities that seek information about [E-Verify] of [its] voluntary nature." IIRIRA, as amended, § 402(d).

Those employers who elect to use E-Verify and actually do use the system to confirm an employee's authorization to work are entitled to a rebuttable presumption that they did not hire that employee knowing that s/he lacks authorization to work in this country. *See* IIRIRA, as amended, § 402(b)(1). Employers who elect to use E-Verify, but in practice continue to use the I-9 process, are not entitled to the E-Verify rebuttable presumption, but can still claim the I-9 affirmative defense. *See* IIRIRA, as amended, § 402(b)(2).

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[23] Pursuant to an executive order by President George W. Bush, certain federal government contractors are now also required to use E-Verify. *See* Exec. Order No. 13,465, 73 Fed.Reg. 33,286 (Jun. 6, 2008).

B. State and Local Immigration Laws

As we noted at the outset, state and local attempts to regulate issues related to immigration have skyrocketed in recent years. According to the National Conference of State Legislatures ("NCSL"), 300 bills pertaining to immigration were introduced in state legislatures in 2005, and thirty-eight of them were enacted into law. National Conference on State Legislatures, *2009 State Laws Related to Immigrants and Immigration January 1-December 31, 2009,* http://www.ncsl.org/default.aspx?tabid=19232 (last visited Aug. 20, 2010). Less than five years later, these numbers had increased more than five-fold: in 2009, over 1,500 bills pertaining to immigration were introduced. From these, 222 laws were enacted, and 131 resolutions adopted. *Id.*

A number of these laws contain provisions that are either identical, or similar, to provisions in Hazleton's ordinances.[24] In their brief filed on behalf of Plaintiffs, *Amici Curiae* Chambers of Commerce note that Arizona, Mississippi, Oklahoma, Utah, Tennessee, Louisiana, West Virginia, Colorado, Minnesota, Georgia, and Rhode Island, as well as the municipalities of Valley Park, Missouri; Mission Viejo, California; Beaufort County, South Carolina; and Apple Valley, California, have all enacted laws that in some

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[24] In fact, Hazleton's mayor got the idea of enacting the IIRAO and the RO from similar ordinances, considered but never passed, in San Bernardino, California. *See* J.A. 1385-87.

way regulate either the procedures employers must undertake in order to avoid hiring unauthorized aliens, or the penalties that can be imposed for doing so. In addition, Plaintiffs call our attention to several localities, including Escondido, California and the City of Farmers Branch, Texas, which have passed ordinances regulating the provision of rental housing to aliens not lawfully present in the United States.

Various challenges have been leveled at these enactments – most commonly, attacks rooted in the Supremacy Clause – and the resulting body of case law informs our analysis. The Court of Appeals for the Ninth Circuit, affirming a decision by the District Court for the District of Arizona, upheld an Arizona statute requiring all employers within the state to use E-Verify, and subjecting businesses that employ unauthorized aliens to a graduated series of sanctions up to and including the permanent revocation of their business licenses. That court rejected the plaintiffs' pre-emption and due process claims. *See Chicanos Por La Causa, Inc. v. Napolitano,* 558 F.3d 856 (9th Cir.2009), *cert. granted,* ___ U.S. ___, 130 S.Ct. 3498, ___ L.Ed.2d ___ (2010) (No. 09-115). The District Court for the Eastern District of Missouri also upheld an employment ordinance virtually identical to the IIRAO against pre-emption, due process, and equal protection challenges, as well as challenges based on state law. *See Gray v. City of Valley Park,* No. 4:07CV00881, 2008 WL 294294 (E.D.Mo. Jan. 31, 2008), *aff'd on other grounds,* 567 F.3d 976 (8th Cir.2009).

In contrast, the Court of Appeals for the Tenth Circuit partially affirmed a preliminary injunction issued by the District Court for the Western District of Oklahoma, barring enforcement of certain provisions of an Oklahoma law on pre-emption grounds. Much like the IIRAO, that law required employers in Oklahoma to verify the work authorization of independent contractors, and also created a private cause of action against business entities that employ unauthorized aliens. *See Chamber of Commerce v. Edmondson,* 594 F.3d 742 (10th Cir.2010).

The District Courts for the Southern District of California and the Northern District of Texas have held that ordinances similar to the housing provisions of the IIRAO and the RO are pre-empted. *See Villas at Parkside Partners v. City of Farmers Branch ("Farmers Branch III"),* 701 F.Supp.2d 835 (N.D.Tex.2010); *Villas at Parkside Partners v. City of Farmers Branch ("Farmers Branch II"),* 577 F.Supp.2d 858 (N.D.Tex.2008); *Garrett v. City of Escondido,* 465 F.Supp.2d 1043 (S.D.Cal.2006).

C. Pre-emption

As we have explained, the district court entered the challenged injunction because it concluded that the IIRAO and the RO, among other failings, are pre-empted by federal law. Although our reasoning departs from that of the district court, we agree with its

conclusion.[25] *See Johnson v. Orr*, 776 F.2d 75, 83 n. 7 (3d Cir.1985) ("An appellate court may affirm a result reached by the district court on reasons that differ so long as the record supports the judgment.").

The Supremacy Clause of the United States Constitution provides that the laws of the United States "shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

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[25] Plaintiffs present a facial challenge to these ordinances. In *Washington State Grange v. Washington State Republican Party*, the Supreme Court explained:

> Under *United States v. Salerno*, 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987), a plaintiff can only succeed in a facial challenge by "establish[ing] that no set of circumstances exists under which the Act would be valid," *i.e.* that the law is unconstitutional in all of its applications. *Id.* at 745, 107 S.Ct. 2095. While some Members of the Court have criticized the *Salerno* formulation, all agree that a facial challenge must fail where the statute has a "plainly legitimate sweep." *Washington v. Glucksberg*, 521 U.S. 702, 739-40 and n. 7, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997).

552 U.S. 442, 449, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008) (alteration in original). Based on this language, Hazleton insists that we must apply the *Salerno* standard to Plaintiffs' claims under the Supremacy Clause. However, since both *Washington State Grange* and *Salerno* involved quite different constitutional challenges than the ones we consider here, it is not at all clear that *Salerno* applies. Nonetheless, it is clear that solely "hypothetical conflicts" between state and local enactments and federal law are usually insufficient to support a finding of pre-emption. *See Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 310, 108 S.Ct. 1145, 99 L.Ed.2d 316 (1988).

The pre-emption doctrine is a necessary outgrowth of the Supremacy Clause. It ensures that when Congress either expresses or implies an intent to preclude certain state or local legislation, offending enactments cannot stand.

As this Court has recently noted, "the Supreme Court has recognized three types of pre-emption: express pre-emption, implied conflict pre-emption, and field pre-emption." *Bruesewitz v. Wyeth Inc.*, 561 F.3d 233, 238-239 (3d Cir.2009) (citing *Hillsborough County, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985)). Both conflict pre-emption and field pre-emption are types of implied pre-emption. *See, e.g., Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985). However, irrespective of the "type" of pre-emption involved, "the purpose of Congress" is the "touchstone" of any pre-emption inquiry. *Wyeth v. Levine*, ___ U.S. ___, 129 S.Ct. 1187, 1194, 173 L.Ed.2d 51 (2009) (internal quotation marks omitted).

However, it is important to note that Congress does not "cavalierly" pre-empt states or municipalities from acting within the parameters of their historic police powers. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996). Accordingly, in pre-emption inquiries, we assume "that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* (internal quotation marks omitted). When states act beyond

the scope of their historic police powers, however, and wander into "an area where there has been a history of significant federal presence," we do not begin with this assumption of non-pre-emption. *United States v. Locke,* 529 U.S. 89, 108, 120 S.Ct. 1135, 146 L.Ed.2d 69 (2000).

Express pre-emption occurs when Congress expressly declares a law's pre-emptive effect. *See Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 541, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001). In such cases, "our task is to identify the domain expressly pre-empted." *Id.* In doing so, we focus in the first instance "on the plain wording of the [federal statute's pre-emption] clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *Sprietsma v. Mercury Marine,* 537 U.S. 51, 62-63, 123 S.Ct. 518, 154 L.Ed.2d 466 (2002) (internal quotation marks omitted). We also consider the "structure and purpose of the statute as a whole . . . as revealed not only in the text, but through [our] reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to [operate]." *Medtronic,* 518 U.S. at 486, 116 S.Ct. 2240 (internal quotation marks and citation omitted).

Implied field pre-emption occurs when state or local governments attempt regulation in a field which Congress has implied an intent to exclusively occupy. *See English v. Gen. Electric Co.,* 496 U.S. 72, 79, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990). Congress's intent to occupy a field can be inferred where a federal regulatory scheme is "so pervasive as to make

reasonable the inference that Congress left no room for the States to supplement it," *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98, 112 S.Ct. 2374, 120 L.Ed.2d 73 (1992) (internal quotation marks omitted), or where an Act of Congress "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947).

Implied conflict pre-emption occurs where it is "impossible . . . to comply with both state and federal law," *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000) (internal quotation marks omitted), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941). "Impossibility" conflict pre-emption exists only where it is truly impossible to comply with both federal and state law. "Obstacle" conflict pre-emption, on the other hand, requires a broader inquiry into the purposes underlying a federal statute, and whether a state law stands as an obstacle to effectuation of those purposes. "What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000).

The Supreme Court has long made clear that federal interests are paramount in the field of immigration. The Court explained seventy years ago: "[t]hat the supremacy of the national power in the general field of foreign affairs, including power over immigration, naturalization and deportation, is made clear by the Constitution was pointed out by authors of The Federalist in 1787, and has since been given continuous recognition by this Court." *Hines*, 312 U.S. at 62, 61 S.Ct. 399; *see also Toll v. Moreno*, 458 U.S. 1, 10, 102 S.Ct. 2977, 73 L.Ed.2d 563 (1982).

However, the Supreme Court has also explained that not every state or local enactment that affects the rights of aliens necessarily interferes with the federal interest in immigration. In *DeCanas v. Bica*, 424 U.S. 351, 96 S.Ct. 933, 47 L.Ed.2d 43 (1976), the Supreme Court articulated a framework for analyzing pre-emption challenges to state and local laws that impact the rights of aliens but do not "regulate immigration." Although *DeCanas* was decided a decade before Congress enacted IRCA and two decades before it enacted IIRIRA, many aspects of the Court's analysis are still relevant to our inquiry.

In *DeCanas*, the Supreme Court considered whether a state law prohibiting the employment of persons unlawfully present was pre-empted by the INA. California had enacted legislation prohibiting employers within the state from "knowingly employ[ing] an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers."

Id. at 352, 96 S.Ct. 933 (internal quotation marks omitted). A group of migrant farmworkers sued, arguing that the law was pre-empted both by the Constitution's exclusive delegation of the power to regulate immigration to the federal government, and by the INA. The Court disagreed.

In upholding the statute, the Court explained that the "[p]ower to regulate immigration is unquestionably exclusively a federal power" under the United States Constitution, precluding all state involvement even if Congress has neither expressed nor implied its intent to preclude that state regulation. *Id.* at 354, 96 S.Ct. 933. "[T]he Constitution of its own force requires pre-emption" of any state efforts to actually regulate immigration. *Id.* at 355, 96 S.Ct. 933. However, the Court also explained that not "every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by this constitutional power." *Id.* Rather, a state law only regulates immigration if it is "essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *Id.* As California's law did not intrude into these proscribed areas, the Court held that it was not pre-empted, absent congressional action.

The Court also held that California's law was not field pre-empted by the INA's regulatory scheme. First, the Court explained that "the regulation of employment of illegal aliens" was not a subject matter of such clear and manifest federal importance as

to require the conclusion that it was occupied by federal regulation. *Id.* at 356, 96 S.Ct. 933. The Court reasoned that states have "broad authority under their police powers to regulate the employment relationship to protect workers within the State," and that California's law fell "within the mainstream of such police power regulation." *Id.* Because the law "focuse[d] directly upon the [] essentially local problems [of employing illegal aliens] and [was] tailored to combat effectively the perceived evils," it did not touch upon a field that by its very nature would support no conclusion but that Congress had occupied it.[26] *Id.* at 357, 96 S.Ct. 933.

Secondly, the Court concluded that the INA as it then existed did not reflect clear and manifest congressional intent to preclude state regulation in the field of employment of aliens here unlawfully. Then, the INA was primarily concerned with "the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country." *Id.* at 359, 96 S.Ct. 933. Only one provision of one section of the INA even mentioned the employment of

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[26] In reaching this conclusion, the Court distinguished cases in which pre-emption was found based on the "predominance of federal interest in the fields of immigration and foreign affairs." *DeCanas*, 424 U.S. at 363, 96 S.Ct. 933. It explained that "there would not appear to be a similar federal interest in a situation in which the state law is fashioned to remedy local problems, and operates only on local employers, and only with respect to individuals whom the Federal Government has already declared cannot work in this country." *Id.*

persons not lawfully in the country.[27] This evidenced "at best . . . a peripheral concern with employment of illegal entrants," which was insufficient to establish a congressional intent to occupy the field. *Id.* at 360, 96 S.Ct. 933. To the contrary, the Court believed that Congress had indicated its intent, through laws addressing farm labor contractors, for the States to "consistent with federal law, regulate the employment of illegal aliens." *Id.* at 361, 96 S.Ct. 933.

The Court did not, however, actually rule on the issue of conflict pre-emption. Rather, it remanded the matter so that the lower courts could determine if California's law was "consistent with federal law." *Id.* In all other respects, though, the Court found the challenged law an appropriate use of state power, given both its limited impact upon "immigration" and Congress's then limited foray into regulating the employment of persons lacking lawful immigration status.

In sum, *DeCanas* holds that the federal authority to "regulate immigration" is exclusive, but states are not necessarily precluded from regulating (consistent with federal law) certain local issues affecting the rights of aliens, unless Congress has indicated an intent to preclude such regulation.

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[27] That provision was contained in 8 U.S.C. § 1324, the section which makes it a felony to "harbor" illegal entrants, and it stated that employing aliens here unlawfully "shall *not* be deemed to constitute harboring." *DeCanas*, 424 U.S. at 360, 96 S.Ct. 933 (internal quotation marks omitted) (emphasis added).

1. Employment Provisions

a. Presumption Against Pre-emption

The district court concluded that the employment provisions of the IIRAO were expressly pre-empted, field pre-empted, and conflict pre-empted. Hazleton challenges each of the district court's conclusions on multiple grounds. Hazleton first claims that the district court erred in failing to apply the presumption against pre-emption. We agree.

As we have noted, Congress does not casually sweep away the historic police powers of states. This reality underlies the rebuttable presumption that federal legislation does not pre-empt those police powers absent "clear and manifest" congressional intent to the contrary. *Medtronic,* 518 U.S. at 485, 116 S.Ct. 2240. Only state and local laws aimed at areas beyond the state's historic police powers, that venture into matters long regulated by the federal government, are not afforded the benefit of this presumption. *See Locke,* 529 U.S. at 108, 120 S.Ct. 1135 ("[A]n assumption of non-pre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence.") (internal quotation marks omitted).

In analyzing the applicability of the presumption in this case, the district court reasoned that "[i]mmigration is an area of the law where there is a history of significant federal presence and where the States have not traditionally occupied the field. In fact . . . immigration is a federal concern not a state

or local matter." *Lozano,* 496 F.Supp.2d at 518 n. 41. Based on this reasoning, the district court refused to presume non-pre-emption. However, the district court's analysis is inconsistent with the framework set forth in *DeCanas.*

As we noted above, in *DeCanas* the Supreme Court explained that not "every state enactment which in any way deals with aliens is a regulation of *immigration.*" 424 U.S. at 355, 96 S.Ct. 933 (emphasis added). Rather, laws regulate immigration only if they attempt to regulate "who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *Id.* Hazleton's employment provisions therefore plainly do not regulate immigration under *DeCanas.* Rather, they regulate the employment of persons unauthorized to work in this country, and like the law at issue in *DeCanas,* fall within the state's historic police powers. Accordingly, they must benefit from the presumption against pre-emption.

We are aware, of course, that the landscape of federal immigration law has changed dramatically since the Court decided *DeCanas.* In enacting IRCA, Congress clearly made the regulation of the employment of unauthorized aliens a central concern of federal immigration policy. However, while this sea change in the federal regulatory scheme is incredibly important for purposes of our substantive analysis, it does not negate the operation of the presumption against pre-emption. The applicability of the presumption turns on a state's *historic* police powers. By

definition, that means that the presumption depends on the *past* balance of state and federal regulation, not on the present.

As we have just explained, until the passage of IRCA, the federal government played at most a very small role in regulating the employment of persons without lawful immigration status. *See DeCanas,* 424 U.S. at 360, 96 S.Ct. 933. Moreover, the Supreme Court concluded that Congress then intended for the states to, "consistent with federal law, regulate the employment of illegal aliens." *Id.* at 361, 96 S.Ct. 933. Thus, when Congress enacted IRCA, it began legislating in an area in which states had regulated, and in which the federal government, for the most part, had not. Accordingly, we presume that Congress did not intend to sweep away the states' historic police powers by enacting IRCA, absent clear evidence to the contrary.

b. Express Pre-emption

As noted above, IRCA includes an express pre-emption clause, which states that: "[t]he provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2). Thus, IRCA expressly pre-empts state and local laws that sanction those who employ unauthorized aliens, unless the

sanction is imposed through a licensing, or similar, law.

The district court read this clause as expressly pre-empting Hazleton's employment provisions in the IIRAO because they impose a sanction – the suspension of a business license – on business entities that employ unauthorized aliens. Hazleton had argued that the IIRAO is a licensing law, and thus saved from the express pre-emptive reach of IRCA, but the district court disagreed. The court reasoned that since the IIRAO imposes the "ultimate sanction" of entirely taking away a business's ability to operate, it is "at odds with the plain language of the express pre-emption provision, which is concerned with state and local municipalities creating civil and criminal sanctions against employers."[28] *Lozano,* 496 F.Supp.2d at 519.

The district court also concluded, based on a review of IRCA's legislative history, that the IIRAO's scheme for revoking licenses is inconsistent with the congressional intent underlying IRCA's saving clause. According to the court, Congress had no intention, in exempting licensing laws from express pre-emption, of permitting states and localities to independently adjudicate whether a business entity has employed an unauthorized alien. In reaching this conclusion,

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[28] In effect, then, the district court believed that a business license was not the species of "license" Congress had in mind in exempting licensing laws from express pre-emption.

the district court reviewed H.R.Rep. No. 99-682(I), reprinted in 1986 U.S.C.C.A.N. 5649, the sole piece of IRCA's legislative history directly discussing the preemption provision. Based on several sentences in that Report, the court concluded that Congress intended the saving clause to only exempt from express preemption local laws that revoke the licenses of persons who *the federal government has found guilty of violating IRCA,* and not the licenses of persons who localities independently adjudicate guilty of violating their own prohibitions against employing unauthorized aliens.[29] Because the IIRAO creates its own procedures for adjudicating whether an employer is guilty of employing unauthorized aliens, and revokes licenses based on that determination, rather than based on a federal determination that an employer has

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[29] The House Report states:

> [t]he penalties contained in this legislation are intended to specifically preempt any state or local laws providing civil fines and/or criminal sanctions on the hiring, recruitment or referral or undocumented aliens. They are not intended to preempt or prevent lawful state or local processes concerning the suspension, revocation or refusal to reissue a license to any person *who has been found to have violated the sanctions provisions in this legislation.* Further, the Committee does not intend to preempt licensing or "fitness to do business laws," such as state farm labor contractor laws or forestry laws, which specifically require such licensee or contractor to refrain from hiring, recruiting or referring undocumented aliens.

H.R.Rep. No. 99-682(I), at 12, 1986 U.S.C.C.A.N. 5649, 5662 (emphasis added).

violated IRCA, the court concluded that the IIRAO's employment provisions do not fall within the scope of IRCA's saving clause. *See Lozano,* 496 F.Supp.2d at 520. On appeal, Hazleton renews its argument that the IIRAO's employment provisions are a "licensing" law within the meaning of IRCA's saving clause, and we agree.

As noted earlier, the text of IRCA's express preemption clause explicitly excludes from its preemptive scope "licensing and similar laws." Congress did not define these terms. Terms that are not statutorily defined are usually ascribed their "ordinary or natural meaning." *Fed. Deposit Ins. Corp. v. Meyer,* 510 U.S. 471, 476, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994).

Merriam-Webster's Dictionary defines a license as "a permission granted by competent authority to engage in a business or occupation or in an activity otherwise unlawful."[30] Similarly, Black's Law Dictionary defines a license as "a permission, usually revocable, to commit some act that would otherwise be unlawful." *Black's Law Dictionary* (8th ed.2004). Here, the IIRAO conditions the grant of a business license on a business's agreement not to employ unauthorized aliens, and on the business's continued adherence to that agreement. A business license certainly falls within the plain meaning of a "license"

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[30] License Definition, Merriam-Webster.com, http://www.merriam-webster.com/dictionary/license (last visited Aug. 17, 2010).

and therefore, it seems clear that the IIRAO's provisions for suspending such licenses constitute a "licensing law."

Plaintiffs nonetheless argue, consistent with the district court's decision, that IRCA's express pre-emption provision would be toothless if a state or municipality could effectively circumvent the general prohibition on imposing sanctions by imposing sanctions of this severity. According to Plaintiffs, the loss of a business license is the "death penalty" for a business, and the express pre-emption clause would be swallowed by its exception if a law regulating business licenses is held to be a licensing law.

In support of their argument, Plaintiffs cite several recent Supreme Court cases which stand for the proposition that courts should read saving clauses narrowly, and in light of the statutory scheme as a whole. *See Aetna Health Inc. v. Davila,* 542 U.S. 200, 217, 124 S.Ct. 2488, 159 L.Ed.2d 312 (2004); *Geier,* 529 U.S. at 870-71, 120 S.Ct. 1913; *Locke,* 529 U.S. at 106, 120 S.Ct. 1135. Looking at IRCA and its purposes more broadly, Plaintiffs argue that it is clear that Congress could not have intended the saving clause to permit states and localities to revoke the business licenses of employers who employ unauthorized aliens.

The problem with Plaintiffs' argument, however, is that even if we look more broadly at IRCA as a whole, there is simply no basis for wedging the limitation Plaintiffs urge into the text. Congress

unequivocally states in the saving clause that licensing laws are not expressly pre-empted by IRCA. Nowhere in IRCA's text or legislative history is there an indication that Congress intended that clause to apply only to licensing laws that impose minor penalties, and not to licensing laws that impose more significant sanctions. Similarly, there is no indication that Congress intended to exclude laws regulating the provision, suspension, and revocation of business licenses from the term "licensing law," and Plaintiffs do not offer an alternative definition of "license" that would sensibly exclude business licenses. *See Chicanos Por La Causa*, 558 F.3d at 865 (finding "no support for [plaintiffs'] interpretation" of the term "license" as excluding business licenses).

When statutory language is plain and unambiguous, "the sole function of the courts . . . is to enforce it according to its terms." *Lamie v. United States Tr.*, 540 U.S. 526, 534, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004) (internal quotation marks omitted). We therefore conclude that the IIRAO is a licensing law under IRCA's saving clause and saved from express preemption.[31]

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[31] Plaintiffs also argue that the IIRAO is not a bona fide licensing law. They note that the IIRAO's title and its "Findings and Declaration of Purpose" section make no reference to licensing, and that the IIRAO does not refer to any existing licensing provisions. Thus, rather than being a true licensing law directed towards any legitimate local concerns, Plaintiffs claim that the IIRAO should be viewed as part of a scheme intended to regulate immigration by keeping all persons lacking

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lawful immigration status out of the City, and by supplanting the federal government's role in these matters. The argument has significant force, and is very troubling.

This record is not without support for the proposition that, in enacting both the IIRAO and the RO, the Hazleton City Council was trying to use every tool at its disposal not merely to address local concerns with a "purely speculative and indirect impact on immigration," *DeCanas*, 424 U.S. at 355, 96 S.Ct. 933, but to alter to the best of its ability the landscape of federal immigration regulation as well. *See, e.g.*, J.A. 1289 (testimony of the President of Hazleton's City Council that he intended Hazleton's ordinances to force the federal government into action); J.A. 1713 (testimony of Hazleton's mayor that the IIRAO is intended "to deter and punish illegal immigrants"). Furthermore, it appears that these ordinances were enacted as part of an organized campaign of certain states and localities attempting to collectively remedy what they view as the federal government's failure to "secure our borders." *See, e.g.*, J.A. 1438 (testimony of Hazleton's mayor that he has encouraged communities across the country to enact similar ordinances).

Although the Supreme Court has never directly addressed how the intent behind a local enactment should factor into a preemption analysis under these circumstances, we do not think the Hazleton City Council's intent is irrelevant. *See Plyler*, 457 U.S. at 207, 102 S.Ct. 2382 (noting the district court's determination that the law at issue had neither "the purpose [n]or effect of keeping illegal aliens out of the State of Texas") (internal quotation marks omitted); *DeCanas*, 424 U.S. at 354 n. 3, 96 S.Ct. 933 (noting disagreement among the California state courts as to whether California's law was "aimed at immigration control") (internal quotation marks omitted). However, we also realize that the Supreme Court has explained that states are not "without any power to deter the influx of persons entering the United States against federal law, and whose numbers might have a discernable impact on traditional state concerns." *Plyler*, 457 U.S. at 229 n. 23, 102 S.Ct. 2382.

The Supreme Court will undoubtedly speak to this tension soon, given the number of states and localities attempting to

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Plaintiffs also argue (consistent with the district court's decision) that the IIRAO does not fall within IRCA's saving clause because it creates and relies upon its own adjudicative system for determining whether an employer has employed an unauthorized alien, rather than relying, as Congress intended, on the adjudicative system created by IRCA. Because this argument is better addressed in the context of the purposes and objectives underlying IRCA, we attend to it in our discussion of obstacle conflict pre-emption.[32]

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chip away piece-meal at the federal power to regulate immigration. Fortunately, we need not wade into these murky waters in order to resolve the claims before us. As we will explain, the employment provisions are plainly pre-empted, regardless of the intent behind them, because they pose an obstacle to the careful balancing of interests underlying IRCA.

[32] The district court also concluded that the IIRAO's employment provisions are pre-empted because IRCA occupies the field of "the employment of unauthorized aliens." *Lozano*, 496 F.Supp.2d at 524. This is a broad field indeed, and a difficult conclusion to sustain given IRCA's saving clause. *See Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 492, 107 S.Ct. 805, 93 L.Ed.2d 883 (1987) (The existence of a saving clause "negates the inference that Congress 'left no room' for state causes of action."). Plaintiffs, however, press the argument of field pre-emption only in a footnote, and we therefore consider it waived. *See John Wyeth & Bro., Ltd. v. CIGNA Int'l Corp.*, 119 F.3d 1070, 1076 n. 6 (3d Cir.1997) (noting, ironically enough in a footnote, that "arguments raised in passing (such as, in a footnote), but not squarely argued, are considered waived").

c. Conflict Pre-emption

That the IIRAO's employment provisions are saved from express pre-emption does not end our inquiry. As the Supreme Court has emphasized, a law that is saved from express pre-emption is still invalid if it is conflict pre-empted. *See Geier*, 529 U.S. at 870-72, 120 S.Ct. 1913. The fact that Congress intends to *save* a general class of laws, such as licensing and similar laws, from express pre-preemption does not mean that Congress intends to *permit* any law within that category even if it impedes federal interests. A federal law that forecloses conflict pre-emption analysis is one that "defeat[s] its own objectives." *Id.* at 872, 120 S.Ct. 1913. Congress may intend "such a complex type of state/federal relationship," but we will not assume it absent proof. *Id.* Therefore, even though the IIRAO is a licensing law, it cannot be allowed to operate if compliance with both its employment provisions and IRCA is impossible, or if those provisions stand as an obstacle to the objectives underlying IRCA. In either case, the Supremacy Clause requires that the IIRAO give way.

The district court concluded that the IIRAO's employment provisions are pre-empted by IRCA because of the numerous ways in which they "differ from and conflict with IRCA." *Lozano*, 496 F.Supp.2d at 529. Hazleton argues that the district court erred by conflating "mere difference" with conflicts sufficient to result in pre-emption. Hazleton's Br. 46.

The City correctly argues that conflict pre-emption occurs only if a "difference" either makes it impossible to comply with both federal and local law or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines,* 312 U.S. at 67, 61 S.Ct. 399; *see also Fla. Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 141, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963). We too have concerns about the district court's approach, both because it did at times equate difference with conflict, and because it failed to anchor its articulation of the congressional purposes underlying IRCA to that statute's language and legislative history.

Nonetheless, upon a thorough consideration of those purposes, we agree that the IIRAO's employment provisions stand as an obstacle to the accomplishment and execution of federal law, and thus are pre-empted.

As we will explain, it is indisputable that Congress went to considerable lengths in enacting IRCA to achieve a careful balance among its competing policy objectives of effectively deterring employment of unauthorized aliens, minimizing the resulting burden on employers, and protecting authorized aliens and citizens perceived as "foreign" from discrimination. *See Edmondson,* 594 F.3d at 767 (IRCA balances the goals of "preventing the hiring of unauthorized aliens, lessening the disruption of American business, and minimizing the possibility of employment discrimination."). The IIRAO substantially undermines this careful balance. It furthers the first

of these federal objectives at the expense of the others. This "significant conflict" is sufficient to rebut the presumption against pre-emption, *see Geier*, 529 U.S. at 885, 120 S.Ct. 1913, and invalidate these provisions under the Supremacy Clause.

IRCA was "one of the longest and most difficult legislative undertakings of recent memory." Presidential Statement on Signing the Immigration Reform and Control Act, 22 Weekly Comp. Pres. Doc. 1534 (Nov. 10, 1986). Over the course of numerous sessions, Congress debated taking the theretofore unprecedented step of directly prohibiting the employment of "unauthorized aliens."[33] Congress ultimately committed to enacting employer sanctions, but in so doing, committed equally to enacting measures that would protect groups likely to be unfairly burdened by those sanctions-employers and authorized workers. IRCA is thus "a carefully crafted political compromise which at every level balances specifically chosen measures discouraging illegal employment with measures to protect those who might be adversely

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[33] At the time of IRCA's passage, there was still significant opposition to requiring employers to play a role in enforcing the nation's immigration policy. *See, e.g.*, 132 Cong. Rec. H10583-01 (daily ed. Oct. 15, 1986) (statement of Rep. Martinez) ("For the first time in history, this bill institutes Federal penalties for private citizens who hire illegal aliens. . . . [We should] put the burden of enforcing the law on the Government, where it belongs, not on private employers. Not only is this unfair to private employers, but it will cause them, out of fear, to discriminate against prospective employees who are 'foreign-looking.' ").

affected." *Nat'l Ctr. for Immigrants' Rights, Inc. v. INS,* 913 F.2d 1350, 1366 (9th Cir.1990), *rev'd on other grounds,* 502 U.S. 183, 112 S.Ct. 551, 116 L.Ed.2d 546 (1991).

Congress paid considerable attention to the costs IRCA would impose on employers, *see, e.g.,* H.R.Rep. No. 99-682(I), at 43, 1986 U.S.C.C.A.N. 5649, 5694 ("Considerable discussion was generated during the processing of [this bill] to the effect the employer sanctions provisions were placing an undue burden on employers in requiring them to do the paperwork and keep records on employees."), and drafted the legislation in a manner that would minimize those burdens, *see, e.g.,* 132 Cong. Rec. H10583-01 (daily ed. Oct. 15, 1986) (statement of Rep. Bryant) (IRCA has been "carefully designed for the minimum burden necessary . . . to be effective.").

Congress heeded these concerns in crafting IRCA's prosecution and adjudication scheme. For example, it limited investigation of complaints to those with a "substantial probability of validity" in order to minimize the possibility of "harassment" of "innocent employers." 8 U.S.C. § 1324a(e)(1)(B); S.Rep. No. 99-132, at 35 (1985). Similarly, Congress "intended to minimize the burden and the risk placed on the employer in the verification process." *Collins Foods Int'l, Inc. v. INS,* 948 F.2d 549, 554 (9th Cir.1991). Accordingly, the I-9 process only requires employers to ascertain whether employees' documents appear "on [their] face to be genuine." 8 U.S.C. § 1324a(b)(1)(A)(ii); H.R.Rep. No. 99-682(I), at 16.

Congress could have required employers to ascertain the actual legitimacy of such documents; it did not.

Just as importantly, Congress strove to ensure that the prohibition against hiring unauthorized aliens would not result in discrimination against authorized workers (whether alien or citizen) who appear "foreign," as Congress feared that over-cautious employers might incorrectly assume such persons were unauthorized to work in the United States. IRCA's legislative history could not be more plain or emphatic about the congressional commitment to preventing this sort of discrimination. The House Report explains:

> Numerous witnesses over the past three Congresses have expressed their deep concern that the imposition of employer sanctions will cause extensive employment discrimination against Hispanic-Americans and other minority group members. . . . [T]he Committee does believe that every effort must be taken to minimize the potentiality of discrimination and that a mechanism to remedy any discrimination that does occur *must* be a part of this legislation. . . . *[A]nti-discrimination protections are essential to this bill.*

H.R.Rep. No. 99-682(I), at 22, 1986 U.S.C.C.A.N. 5649, 5672 (internal quotation marks omitted) (emphasis added). IRCA is thus "delicately balanced to serve the goal of preventing unauthorized alien employment while avoiding discrimination against citizens and authorized aliens." *Collins Foods Int'l*, 948 F.2d at 554. As we explained earlier, Congress

created the office of a Special Counsel to handle discrimination charges, *see* 8 U.S.C. § 1324b(c), and specifically required that the President fill that position, *see* 8 U.S.C. § 1324b(c)(1). As also detailed above, Congress authorized administrative law judges to impose on employers found guilty of discrimination civil penalties equivalent to the penalties imposed on employers found guilty of employing unauthorized aliens. *See* 8 U.S.C. § 1324b(g)(2)(B)(iv)(I)-(III).

The Supreme Court has consistently found state and local laws which alter the careful balancing of objectives accomplished by a federal law to be pre-empted, and so have we. *See, e.g., Bonito Boats, Inc. v. Thunder Craft Boats, Inc.,* 489 U.S. 141, 144, 109 S.Ct. 971, 103 L.Ed.2d 118 (1989) (finding Florida law pre-empted because it struck the balance between "the encouragement of invention and free competition in unpatented ideas" differently from federal patent law); *Rogers v. Larson,* 563 F.2d 617, 626 (3d Cir.1977) (finding Virgin Islands law pre-empted because it struck the balance between "assur[ing] an adequate labor force on the one hand and . . . protect[ing] the jobs of citizens on the other" differently from federal immigration law). Hazleton's IIRAO undermines IRCA's careful balancing of objectives in at least four ways.

First, the IIRAO significantly increases employer burden by creating a separate and independent adjudicative system for determining whether an employer is guilty of employing unauthorized aliens.

Hazleton's system fails to reflect the same concern with reducing employer burden as IRCA. In contrast to the federal requirement that a complaint have a "substantial probability of validity," the IIRAO permits investigation of any complaint lodged against an employer regardless of its likely merit. Under Section 4 of the IIRAO, a complaint is valid so long as it includes an "allegation which describes the alleged violator(s) as well as the actions constituting the violation, and the date and location where such actions occurred." IIRAO § 4B. Upon receipt of *any* such complaint (so long as it does allege a violation on the basis of national origin, ethnicity, or race), Hazleton's Code Enforcement Office must, "within three business days, request identity information from the business entity regarding any persons alleged to be unlawful workers." IIRAO § 4B(2)-(3).

Similarly, the IIRAO provides employers with substantially fewer procedural protections than IRCA. Under IRCA, an employer must be provided with notice and an opportunity for a hearing, and an administrative law judge must find the employer guilty of violating IRCA by a preponderance of the evidence *before* any sanctions can be imposed. *See* 8 U.S.C. § 1324a(e). That employer also has a right to an administrative appeal and judicial review. *See id.* In marked contrast, the IIRAO requires Hazleton's Code Enforcement Office to immediately suspend the business license of a business entity which fails to provide requested information about alleged unlawful workers within three business days. *See* IIRAO

§ 4B(3). Additionally, if a business entity fails to terminate anyone that Hazleton has decided is an unlawful worker within three business days, the Code Enforcement Office immediately suspends its license. *See* IIRAO § 4B(4). A business entity that has been "subject to a complaint and subsequent enforcement" can then seek relief in court, but both the procedure and remedies available to that employer are entirely unclear on the face of the ordinance. *See* IIRAO § 7F.

The crux of this conflict, however, transcends the differences between the IIRAO's prosecution and adjudication system and IRCA's. Rather, it is rooted in the fact that Hazleton has established an alternate system *at all*. As we have explained, Congress created a comprehensive and carefully balanced prosecution and adjudication system, and foremost among its goals in doing so was to minimize the burden this system would impose on employers. *See Edmondson*, 594 F.3d at 751 (IRCA "exhaustively details a specialized administrative scheme for determining whether an employer has knowingly employed an unauthorized alien."). We therefore cannot fathom that Congress intended to tolerate the "supplementing" of its carefully crafted system with independent state and local systems, which by their mere existence drastically increase burdens on employers.

Under the IIRAO, a business in Hazleton must worry about two separate systems of complaints, investigations, prosecutions, and adjudications. Furthermore, Hazleton's ordinance is not the only consideration here, given the emerging landscape

of local and state regulation in the area. *See, e.g., Buckman Co. v. Pls.' Legal Comm.*, 531 U.S. 341, 350, 121 S.Ct. 1012, 148 L.Ed.2d 854 (2001) (explaining that if one state's tort system is permitted then federal law will have to operate "in the shadow of 50 States' tort regimes [thereby] dramatically increas[ing] the burdens facing potential applicants-burdens not contemplated by Congress"). If Hazleton's ordinance is permissible, then each and every state and locality would be free to implement similar schemes for investigating, prosecuting, and adjudicating whether an employer has employed unauthorized aliens. *See Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 373, 128 S.Ct. 989, 169 L.Ed.2d 933 (2008) (reasoning that allowing one state to implement its own monitoring system "would allow other States to do the same . . . easily lead[ing] to a patchwork of state . . . laws, rules, and regulations"). As noted above, many states and localities have already tried. A patchwork of state and local systems each independently monitoring, investigating, and ultimately deciding – all concurrently with the federal government – whether employers have hired unauthorized aliens could not possibly be in greater conflict with Congress's intent for its carefully crafted prosecution and adjudication system to minimize the burden imposed on employers.[34]

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[34] Although we have been framing this question as one of conflict pre-emption, Hazleton's actions may be subject to field pre-emption as well. "Field preemption arises by implication

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Second, the IIRAO contravenes congressional objectives by altering the employment verification scheme created by IRCA, and supplemented by IIRIRA and subsequent legislation. While IRCA affords an affirmative defense to any employer who uses the I-9 process to verify the work authorization of its employees, the IIRAO does not. The IIRAO provides its safe harbor only to employers who use E-Verify. In this way, the IIRAO significantly alters the risk calculus for employers, and coerces use of E-Verify.[35] The IIRAO also directly compels City

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when state law occupies a 'field reserved for federal regulation.'" *Bruesewitz*, 561 F.3d at 238 (*citing United States v. Locke*, 529 U.S. 89, 111, 120 S.Ct. 1135, 146 L.Ed.2d 69 (2000)). The categories of pre-emption are not "rigidly distinct. Indeed, field pre-emption may be understood as a species of conflict pre-emption: A state law that falls within a preempted field conflicts with Congress' intent (either express or plainly implied) to exclude state regulation." *English*, 496 U.S. at 79 n. 5, 110 S.Ct. 2270. If Congress, in service of the goal of minimizing employer burden, intended for its adjudicative system to be exclusive, IRCA would occupy the field of prosecuting and adjudicating employers for the hiring of unauthorized aliens.

[35] Throughout its brief, Hazleton makes much of the fact that the IIRAO does not actually "coerce" employers to use E-Verify (or as we discuss later, to verify the work authorization of independent contractors) because even though safe harbor is provided only to those employers who use E-Verify, employers are given the opportunity to terminate an unauthorized alien before sanctions are imposed, thus making a safe harbor less essential. The argument is the proverbial "red herring."

It is clear that Hazleton significantly incentivizes use of E-Verify. However one characterizes this coercion, it is inconsistent with congressional intent. The IIRAO plainly alters the riskiness of choosing not to use E-Verify (or choosing not to verify

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agencies, City contractors, and all employers twice found guilty of violating the IIRAO to use E-Verify. These provisions contradict congressional intent for E-Verify to remain fully voluntary for the vast majority of employers – a decision that, once again, balances seeking efficacy in employment authorization verification with the goals of minimizing employer burden and preventing employment discrimination. *See Geier,* 529 U.S. at 878, 120 S.Ct. 1913 (finding state law imposing a specific requirement conflict pre-empted where Congress "deliberately sought variety" and to provide "several different" options). Similarly, they contravene congressional intent for the I-9 process to serve as a universal protection against sanctions.

As Plaintiffs pointed out at oral argument, if Congress were solely concerned with ensuring that no unauthorized alien ever secured employment in the United States, it would have and could have found a better mechanism for verifying employment authorization than the I-9 process. The I-9 process is not foolproof, and yet it remains the default employment verification system twenty-four years after IRCA's enactment. This reflects Congress's determination that E-Verify, which advances certain federal objectives to

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the work authorization of independent contractors). The anxiety associated with these choices is itself a burden from which Congress intended to protect employers. *See, e.g.,* H.R.Rep. No. 99-682(I), at 16 (limiting the scope of employers' responsibilities to reduce the "concern[s]" of "cautious employers").

the detriment of others, is not yet appropriate for mandated use.

At least for certain categories of employees, studies have shown that E-Verify is more effective than the I-9 process for determining whether an employee is authorized to work in the United States. *See* U.S. Citizenship and Immigration Services, *Report to Congress on the Basic Pilot Program*, June 2004, at 3 (The program "reduced unauthorized employment among participating employers by permitting employers to determine whether the information provided by employees on I-9 forms is consistent with information on SSA and DHS databases."). However, because of problems with the relevant databases, E-Verify has been alarmingly ineffective in verifying the employment authorization of work-authorized aliens and naturalized citizens, and thus has effectively resulted in discrimination against these groups. *See id.* ("[T]he tentative nonconfirmation rate was unacceptably high for foreign-born *work-authorized* employees and was higher than desirable for U.S.-born employees. This created burdens for employees and employers . . . and led to unintentional discrimination against foreign-born persons.").

As of the last congressionally-mandated evaluation of E-Verify in 2007, foreign-born work-authorized employees were still thirty times more likely to receive tentative nonconfirmations than employees born in the United States, *see* Westat, *Findings of the Web Basic Pilot Evaluation ("2007 Findings")* (September 2007), at xxv, and foreign-born United States

citizens were seven times more likely to receive erroneous tentative nonconfirmations than work-authorized aliens, *see id.* This study thus made clear that "further improvements are needed" before E-Verify could be made mandatory. *See id.*, at xxi. Accordingly, through various expansions of the program, Congress has continually required that E-Verify be strictly voluntary for the vast majority of employers. *See, e.g.*, Department of Homeland Security Appropriations Act, 2010, Pub.L. No. 111-83, § 547, 123 Stat. 2177; Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Pub.L. No. 110-329, Div. A, § 143, 122 Stat. 3574, 3580 (2008); Basic Pilot Program Extension and Expansion Act of 2003, Pub.L. No. 108-156, §§ 2, 3, 117 Stat. 1944 (2003); Basic Pilot Extension Act of 2001, Pub.L. No. 107-128, § 2, 115 Stat. 2407 (2002).

The voluntariness of the system protects employers as well as employees. E-Verify has costs, including set-up and training expenses. *See 2007 Findings*, at xxvi; *Edmondson*, 594 F.3d at 756 (E-Verify has significant costs "in the form of implementation and training expenses."). Given the problems with the system, these costs are not yet a reliable investment. Moreover, E-Verify continues to operate on a trial basis, and absent action by Congress, its statutory authorization will terminate in 2012. *See* Department of Homeland Security Appropriations Act, 2010, Pub.L. No. 111-83, § 547, 123 Stat. 2177. Mandating E-Verify now therefore requires employers to incur costs that may be entirely worthless in the

long-run. In all these ways, Congress's refusal to make E-Verify mandatory is consistent with its objective of ensuring that IRCA imposes the "minimum burden necessary . . . to be effective." *See* 132 Cong. Rec. H10583-01 (daily ed. Oct. 15, 1986) (statement of Rep. Bryant).

Additionally, Hazleton's scheme increases the burden on interstate employers by failing to provide safe harbor for those who use the I-9 process. As the court explained in *Edmondson*, "[b]y making the I-9 system a uniform national requirement, Congress limited the compliance burden on interstate corporations while facilitating uniform enforcement." 594 F.3d at 767. A uniform system reduces costs for employers with multiple locations throughout the country by ensuring that the same human resources procedures can be used in all locations. Hazleton's scheme denies interstate employers who use the I-9 process the benefits of uniformity. Interstate employers with locations in Hazleton (who wish to ensure safe harbor in all locations) would either have to adhere to different regulations in different locations, or use E-Verify in all locations.

In its defense, Hazleton argues that the other courts that have considered the question of states' and localities' power to mandate E-Verify have concluded that there is insufficient evidence that Congress's refusal to allow the federal government to make E-Verify mandatory reflects an intent to deprive states and localities of the power to do so. In *Chicanos* Por La Causa, for instance, the Court of

Appeals for the Ninth Circuit concluded that an Arizona law that made use of E-Verify mandatory was not conflict pre-empted. It explained that the fact that "Congress made participation in E-Verify voluntary at the national level . . . did not in and of itself indicate that Congress intended to prevent states from making participation mandatory." *See Chicanos Por La Causa*, 558 F.3d at 866-67. Similarly, in *Gray*, the District Court for the Eastern District of Missouri declined to interpret "Congress's decision not to make [E-Verify] mandatory as restricting a state or local government's authority under the police powers." *Gray*, 2008 WL 294294, at *19. That court reasoned that a locality's mandating of E-Verify is consistent with the federal goal of "greater enforcement." *Id.*

These decisions, however, fail to afford proper weight to the purposes underlying Congress's decision to retain E-Verify as a voluntary program. Despite its advantages, E-Verify also has significant problems, and accordingly mandating its use interferes with the balancing of interests embodied in IRCA. The conclusion that mandating E-Verify is consistent with the goal of "greater enforcement" thus simply ignores that enforcement is not Congress's only concern. Again, Hazleton has placed a priority on deterring employment of unauthorized aliens, but failed to concern itself with the costs its ordinance imposes on employers and on work-authorized aliens.

There is yet another way in which the IIRAO obstructs the congressional purposes underlying IRCA. The IIRAO coerces employers to verify the

work authorization of independent contractors, even though Congress purposely excluded independent contractors from IRCA's verification requirements. Although employers do face liability under IRCA for *knowingly* utilizing the services of independent contractors who are unauthorized aliens, they are not required to actually verify contractors' work eligibility, as they must with employees. *See* 8 U.S.C. § 1324a(a). Thus, employers can utilize contractors' services without incurring the expense of verification, or the anxiety of potential sanctions. The IIRAO, on the other hand, does not distinguish between employees and independent contractors, and thus effectively coerces businesses to verify their contractors' authorization. *See* IIRAO § 4A. In so doing, the IIRAO fundamentally alters a business's relationship with its contractors and undermines the careful balancing of objectives Congress intended.

In drafting IRCA, Congress explicitly declined to sanction employers based on the work authorization status of "casual hires (i.e., those that do not involve the existence of an employer/employee relationship)." H.R.Rep. No. 99-682(I), at 11, 1986 U.S.C.C.A.N. 5649, 5661. This was not an unreasoned choice, but part of the crafting of the statute to minimize the burden placed on employers. As the court explained in *Edmondson*, "[e]mployers are not required [under federal law] to verify the work eligibility of independent contractors" because it "would increase the burdens on business." 594 F.3d at 767. Businesses utilize independent contractors, in part, to reduce the

costs and liabilities associated with procuring labor when an enduring and structured relationship is not needed. Compelling businesses to concern themselves with the work authorization status of contractors alters this relationship, and also raises costs.

Ironically, the IIRAO is equally problematic for pre-emption purposes because it only coerces but does not directly require verification of independent contractors' work authorization, while imposing sanctions on employers if their contractors are unauthorized. Although earlier versions of the bills that became IRCA did not require employers to use an employment verification system, Congress ultimately decided that a mandatory and uniformly used employment verification system *must* be a counterpart of employer sanctions. Absent that requirement, Congress concluded, employers would too often "guess" about their prospective hires' work authorization. *See* H.R.Rep. No. 99-682(I), at 23, 1986 U.S.C.C.A.N. 5649, 5672 ("[T]he bill does provide substantial protections against discrimination in the form of a uniform verification process for all new hires."); S.Rep. No. 99-132, at 23 ("To be nondiscriminatory . . . any employee eligibility system must apply equally to each member of the U.S. workforce."). Guesswork unavoidably yields discrimination in hiring, and that

result could not be more at odds with congressional intent.[36]

Hazleton's failure to balance its sanctions with anti-discrimination protections is a final area in which the employment provisions of the IIRAO significantly conflict with IRCA. Congress was clear that "a mechanism to remedy any discrimination that [occurs because of employer sanctions] must be a part of" employer sanctions legislation. H.R.Rep. No. 99-682(I), at 22, 1986 U.S.C.C.A.N. 5649, 5672. Hazleton contends that IRCA's anti-discrimination provision fully accomplishes the congressional goal of deterring unlawful discrimination, and that it is not compelled to duplicate federal efforts. Hazleton misses the point.

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[36] Plaintiffs also argue that the IIRAO stands as an obstacle to IRCA in several other ways. They argue that it: requires employers to verify the employment authorization of casual domestic laborers, another group purposefully excluded from IRCA's verification requirements; requires unions to verify the work authorization of members they refer for work in certain instances, when unions operating in this capacity were also purposefully excluded from IRCA's verification requirements; and denies to employees the "cure period" available under federal law to establish work authorization after receiving a tentative nonconfirmation from E-Verify. Hazleton contests that the IIRAO's employment provisions operate in these ways, and the language of the ordinance in ambiguous. Furthermore, the district court did not make any findings that would allow us to resolve these claims. Accordingly, we do not factor these considerations into our pre-emption analysis. As we have explained, "hypothetical" conflicts usually will not support a finding of preemption. *See Schneidewind*, 485 U.S. at 310, 108 S.Ct. 1145.

While drafting IRCA, Congress heard testimony that imposing employer sanctions would create economic incentives for employers to discriminate against workers who appeared to be of foreign origin. If hiring unauthorized aliens were penalized, but discriminating against authorized foreign workers were not, employers might rationally choose not to hire anyone who appeared "foreign" in an effort to avoid entirely the threat of sanctions. *See, e.g.,* 132 Cong. Rec. S16879-01 (daily ed. Oct. 17, 1986) (statement of Sen. Hart) ("The employer sanctions in the legislation will undoubtedly act as an incentive for businesses to 'play it safe' and refuse to hire individuals whose status may be in question. This would mean that [B]lacks, Hispanics, and Asians would encounter new difficulties in getting hired."). Consequently, Congress decided that IRCA must allow judges to impose on employers who discriminate in hiring penalties of the *exact same magnitude* as imposed on employers who hire unauthorized aliens. *Compare* 8 U.S.C. § 1324a(e)(4)(A)(i)-(iii) *with* 8 U.S.C. § 1324b(g)(2)(B)(iv)(I)-(III).

The IIRAO's employment provisions upset this careful balance. By imposing additional sanctions on employers who hire unauthorized aliens, while not penalizing those who discriminate, Hazleton has elected to place all of its weight on one side of the regulatory scale. This creates the exact situation that Congress feared: a system under which employers might quite rationally choose to err on the side of discriminating against job applicants they perceive to

be foreign. This is inconsistent with IRCA and therefore cannot be tolerated under the Supremacy Clause.

Hazleton attempts to parry the thrust of this argument by again relying on the decisions in *Chicanos Por La Causa* and *Gray*. Those courts rejected the argument that licensing laws that revoked the licenses of businesses who employed unauthorized aliens were likely to increase discrimination, and would contravene IRCA absent an anti-discrimination component.

We believe those decisions undervalue the emphasis Congress placed on preventing discrimination, and the pain-staking care Congress took to achieve that objective. For example, the courts in both *Chicanos Por La Causa* and *Gray* demanded proof that employer sanctions result in discrimination. That is puzzling because Congress has already addressed that question. Although Congress could not have been certain that one-sided sanctions would lead to future discrimination when it enacted IRCA, it was sufficiently troubled by the likelihood to commit to preventative action. *See* H.R.Rep. No. 99-682(II), at 4, reprinted in 1986 U.S.C.C.A.N. 5757 (The "House of Representatives recognized [the] potential for this unfortunate cause and effect relationship between sanctions enforcement and resulting employment discrimination"). Notably, Congress also required the Comptroller General to report, three years after IRCA's enactment, on whether employer sanctions had resulted in discrimination. The Comptroller General concluded that employer sanctions had

caused "widespread discrimination." U.S. Gov't Accountability Office, GAO/T-GGD-90-31, *Testimony on Immigration Reform: Employer Sanctions and the Question of Discrimination* (1990).

Congress stated repeatedly that countervailing anti-discrimination protections *must* be a part of any employer sanctions legislation, *see* H.R.Rep. No. 99-682(II), at 4, 1986 U.S.C.C.A.N. 5757, 5761 ("[I]f there is to be sanctions enforcement and liability, there must be an *equally strong* and readily available remedy if resulting employment discrimination occurs.") (emphasis added), and we think this just as true when states and localities regulate in this area. To be consistent with federal law, states and localities that use regulatory enactments to sanction employers who have been found guilty of employing unauthorized aliens under IRCA must impose *sanctions of equal severity* on employers found guilty of discriminating.

Hazleton attempts to shield its legislative efforts from pre-emption based on the doctrine of "concurrent enforcement," but this could not be less persuasive. As Hazleton itself acknowledges, "concurrent enforcement activity is authorized" only where "state enforcement activities *do not impair federal regulatory interests.*" Hazleton's Br. 57 (quoting *Gonzales v. City of Peoria*, 722 F.2d 468, 474 (9th Cir.1983), *overruled on other grounds by, Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir.1999)) (emphasis added). Hazleton claims that the IIRAO satisfies this standard because "the employment provisions . . . were

drafted with meticulous care to match the terminology and scope of federal law." Hazleton's Br. 58. Given our discussion thus far, we need not belabor here explaining why this assertion is wrong. Simply put, Hazleton has enacted a regulatory scheme that is designed to further the single objective of federal law that it deems important – ensuring unauthorized aliens do not work in the United States. It has chosen to disregard Congress's other objectives – protecting lawful immigrants and others from employment discrimination, and minimizing the burden imposed on employers. Regulatory "cherry picking" is not concurrent enforcement, and it is not constitutionally permitted.

Notably, this is not the first time that we have confronted a local law that skews the federal government's careful balancing of objectives in the regulation of alien employment. We addressed a similar situation over thirty years ago in *Rogers v. Larson*, 563 F.2d 617 (1977). There, the Government of the Virgin Islands had enacted a law which called for the replacement of certain nonimmigrant alien workers with qualified citizens or lawful permanent resident workers, if and when such workers became available. Nonimmigrant aliens brought suit arguing that the territorial law was pre-empted by the INA, and in particular by federal regulations guaranteeing nonimmigrant aliens' employment for definite periods of time. We agreed.

In striking down the Virgin Islands' legislative effort as an obstacle to the congressional purposes

underlying the INA, we made clear that the fact that the two statutory schemes shared purposes in common did not save the territorial law from preemption. Rather, the laws were directly at odds with each other because they "str[uck] the balance between [the] goals differently." *Id.* at 626. The Virgin Islands statute struck the balance "more in the direction of protection of citizen-workers," and federal law struck it more in the direction of protection of employers and alien workers. *Id.* "Because of the different emphasis the two statutory schemes place[d] on the purposes of job protection and an adequate labor force," the Virgin Islands provision was invalid under the Supremacy Clause. *Id.* The same is just as true here.

It is, of course, not our job to sit in judgment of whether state and local frustration about federal immigration policy is warranted. We are, however, required to intervene when states and localities directly undermine the federal objectives embodied in statutes enacted by Congress. The employment provisions of the IIRAO "stand[ ] as an obstacle to the accomplishment and execution" of IRCA's objectives, *Hines,* 312 U.S. at 67, 61 S.Ct. 399, and thus are preempted.

2. Housing Provisions

Our final inquiry addresses Plaintiffs' claim that the housing provisions of the IIRAO and the RO are

pre-empted. The district court agreed with Plaintiffs, and so do we.

Before delving into the substance of this analysis, however, we must first consider whether the presumption against pre-emption applies to the housing provisions. The district court did not distinguish between the employment and housing provisions in addressing the presumption; it summarily concluded that both operate in the field of "immigration," and that because of the "history of significant federal presence" in that area, the presumption did not apply. *Lozano,* 496 F.Supp.2d at 518 n. 41. We have explained why that conclusion was erroneous as applied to the employment provisions, which under *DeCanas,* fall within the states' historic police powers. The housing provisions, however, raise a very different issue. As the District Court for the Northern District of Texas explained in *Farmers Branch III,* "[l]ocal regulation that conditions the ability to enter private contract for shelter on federal immigration status is of a fundamentally different nature than . . . restrictions on employment." 701 F.Supp.2d 835, 855-56.

The parties characterize the housing provisions of the RO and the IIRAO in starkly different terms. Hazleton maintains that the housing provisions regulate rental accommodations, and thus, like the employment provisions, fall within the state's historic police powers. Plaintiffs, on the other hand, argue that these provisions regulate *who may live* in Hazleton based on immigration status, and that regulating

which aliens are permitted to reside in the United States is a historically federal function far beyond the police powers of any state.

Although we realize that a state certainly can, and presumably should, regulate rental accommodations to ensure the health and safety of its residents, and that such regulation may permissibly affect the rights of persons in the country unlawfully, *see DeCanas,* 424 U.S. at 355, 96 S.Ct. 933, we cannot bury our heads in the sand ostrich-like ignoring the reality of what these ordinances accomplish. Through its housing provisions, Hazleton attempts to regulate residence based solely on immigration status. Deciding which aliens may live in the United States has always been the prerogative of the federal government. Hazleton purposefully chose to enter this area of "significant federal presence." *Locke,* 529 U.S. at 108, 120 S.Ct. 1135. Accordingly, we will not presume non-pre-emption.

The rest of our analysis flows directly from our conclusion that Hazleton's housing provisions regulate which aliens may live there. Under *DeCanas,* a state or locality may not "regulate immigration," which the Supreme Court has defined as any attempt to determine "who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *DeCanas,* 424 U.S. at 355, 96 S.Ct. 933. Such power is delegated by the Constitution exclusively to the federal government, and even if Congress had never acted in the field, states and localities would be precluded from doing so. *See*

id. Thus, over a century ago, the Supreme Court explained that: "[t]he doctrine is firmly established that the power to exclude or expel aliens is vested in the political departments of the [federal] government, to be regulated by treaty or by act of Congress." *Yo v. United States,* 185 U.S. 296, 302, 22 S.Ct. 686, 46 L.Ed. 917 (1902). Whether Hazleton inadvertently stumbled into this exclusively federal domain, or decided to defiantly barge in, it is clear that it has attempted to usurp authority that the Constitution has placed beyond the vicissitudes of local governments.

The housing provisions of the IIRAO and the RO are also field pre-empted by the INA. As the Supreme Court explained in *DeCanas,* the central concern of the INA is with "the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country." 424 U.S. at 359, 96 S.Ct. 933. The "comprehensiveness of the INA scheme for regulation of immigration and naturalization," *id.*, plainly precludes state efforts, whether harmonious or conflicting, to regulate residence in this country based on immigration status.

We recognize, of course, that Hazleton's housing provisions neither control actual physical entry into the City, nor physically expel persons from it. Nonetheless, "[i]n essence," that is precisely what they attempt to do. *Bonito Boats,* 489 U.S. at 160, 109 S.Ct. 971. "It is difficult to conceive of a more effective method" of ensuring that persons do not enter or

remain in a locality than by precluding their ability to live in it. *Id.*

At oral argument, Hazleton posited that aliens lacking lawful status could still reside in the City through purchasing a home, or through staying with friends.[37] The response is as disingenuous as it is unrealistic. There is nothing on this record that suggests that the people whom the residential provisions are aimed at could avail themselves of such options. Even if they were viable alternatives for some, however, many others still would be excluded, and that is sufficient for these provisions to be preempted.

We also recognize that Hazleton's housing provisions regulate presence only within its city limits, not the entire country. This does not change the analysis. To be meaningful, the federal government's exclusive control over residence in this country must extend to any political subdivision. Again, it is not only Hazleton's ordinance that we must consider. If Hazleton can regulate as it has here, then so could every other state or locality. *See Rowe*, 552 U.S. at 373, 128 S.Ct. 989. As the District Court for the Northern District of

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[37] We point out that they could stay with friends only if those friends owned property and did not rent. Authorized occupants of apartments who permit persons lacking lawful immigration status to stay with them are also fined under the RO: "$1000 for each . . . Occupant . . . that does not have an occupancy permit" and $100 per day per any such Occupant until the violation is corrected. RO § 10b.

Texas reasoned: "we can imagine the slippery slope . . . if every local and state government enacted laws purporting to determine that . . . [certain persons] could not stay in their bounds. If every city and state enacted and enforced such laws . . . the federal government's control over decisions relating to immigration would be effectively eviscerated." *Villas at Parkside Partners v. City of Farmers Branch ("Farmers Branch I")*, No. 3:08-cv-1551-B, Hrg. Tr. at 136 (N.D.Tex. Sept. 12, 2008). Indeed, the record strongly suggests that Hazleton's mayor intended these provisions to be at the forefront of exactly such an evisceration. *See supra* note 31.

The housing provisions of the IIRAO and the RO are also conflict pre-empted by the INA. As the district court explained, these provisions attempt to effectively "remove" persons from Hazleton based on a snapshot of their current immigration status, rather than based on a federal order of removal. This is fundamentally inconsistent with the INA.

Hazleton goes to great lengths to defend its housing provisions as providing for an accurate assessment of tenants' immigration status, and only denying housing to those whom the federal government confirms are here unlawfully. Even assuming Hazleton is correct, this argument does not advance Hazleton's cause; rather, it highlights the fundamental misconception at the heart of these ordinances. Through its housing provisions, Hazleton attempts to remove persons from the community based on *current* immigration status. However, as Justice Blackmun

explained in *Plyler:* "the structure of the immigration statutes makes it impossible for the State to determine which aliens are entitled to residence, and which eventually will be deported." 457 U.S. at 236, 102 S.Ct. 2382 (Blackmun, J., concurring).

Under federal law, an unlawful immigration status does not lead instantly, or inevitably, to removal. Under most circumstances, a federal removal hearing under section 240 of the INA is required. Absent certain limited exceptions, this proceeding is the "sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States." 8 U.S.C. § 1229a(a)(3). As we explained in detail above, knowing whether the government will decide to initiate proceedings against a particular alien is as impossible as trying to predict the outcome of such a proceeding once initiated.

The federal government has discretion in deciding whether and when to initiate removal proceedings. *See Juarez,* 599 F.3d at 566. As the district court found, the government purposefully exercises its discretion not to prosecute in certain instances, and thereby tacitly allows the presence of those whose technical status remains "illegal." *See Lozano,* 496 F.Supp.2d at 531 n. 56. Furthermore, once the government initiates these proceedings, whether they will result in removal is far from certain. A judge may award discretionary relief saving a removable alien from removal, or even adjusting that alien's status to

that of lawful permanent resident. *See* 8 U.S.C. § 1229b. Thus, for these reasons, it is simply:

> impossible for a State to determine which aliens the Federal Government will eventually deport, which the Federal Government will permit to stay, and which the Federal Government will ultimately naturalize. Until an undocumented alien is ordered deported by the Federal Government, no State can be assured that the alien will not be found to have a federal permission to reside in the country, perhaps even as a citizen. Indeed, even the Immigration and Naturalization Service cannot predict with certainty whether any individual alien has a right to reside in the country until deportation proceedings have run their course.

Plyler, 457 U.S. at 241 n. 6, 102 S.Ct 2382 (Powell, J., concurring).

Stitched into the fabric of Hazleton's housing provisions, then, is either a lack of understanding or a refusal to recognize the complexities of federal immigration law. Hazleton would effectively remove from its City an alien college student the federal government has purposefully declined to initiate removal proceedings against.[38] So too would Hazleton remove an alien battered spouse, currently unlawfully present, but eligible for adjustment of status to

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[38] *See* Julia Preston, *Students Spared Amid an Increase in Deportations*, N.Y. Times, Aug. 9, 2010.

lawful permanent resident under the special protections Congress has afforded to battered spouses and children. *See* 8 U.S.C. § 1229b(b)(2). In each of these instances, as in every single instance in which Hazleton would deny residence to an alien based on immigration status rather than on a federal order of removal, Hazleton would act directly in opposition to federal law.

Hazleton attempts to avoid this result by again relying on the concept of "concurrent enforcement" to defend its housing provisions. According to Hazleton, its housing provisions mirror the INA's prohibition against "harboring," which imposes criminal penalties on:

> Any person who . . . knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation.

8 U.S.C. § 1324(a)(1)(A)(iii). Hazleton contends that since federal courts have consistently found that providing housing to aliens lacking lawful immigration status constitutes unlawful "harboring," its housing provisions do no more than concurrently enforce federal law. Hazleton is wrong.

As we have explained, Hazleton's housing provisions operate in a field which the federal government

exclusively occupies. Therefore, even if Hazleton's housing provisions did concurrently enforce federal law, this would not save them; even harmonious regulation is pre-empted here. However, Hazleton is also plainly incorrect in claiming that its housing provisions "mirror" federal law. The federal prohibition against harboring has never been interpreted to apply so broadly as to encompass the typical landlord/tenant relationship.

8 U.S.C. § 1324(a)(1)(A)(iii) criminalizes harboring an alien, knowing or in reckless disregard of the fact that the alien came to, or remains in, the United States in violation of law. The statute, however, does not define the term "harboring," and the Supreme Court has yet to do so. As a result, the breadth of the term is currently in dispute among the Circuit Courts of Appeals. Some courts, our own included, have found that culpability requires some conduct that helps to conceal an alien from authorities. We, along with the Court of Appeals for the Second Circuit, define "harboring" as conduct "tending to substantially facilitate an alien's remaining in the United States illegally *and to prevent government authorities from detecting the alien's unlawful presence.*" *United States v. Ozcelik,* 527 F.3d 88, 100 (3d Cir.2008) (internal quotation marks omitted) (emphasis added); *see also United States v. Kim,* 193 F.3d 567, 574 (2d Cir.1999) (Harboring "encompasses conduct tending substantially to facilitate an alien's remaining in the United States illegally *and* to prevent government authorities from detecting his unlawful presence.")

(emphasis added). Thus, we have held that "harboring" requires some act of obstruction that reduces the likelihood the government will discover the alien's presence. It is highly unlikely that a landlord's renting of an apartment to an alien lacking lawful immigration status could ever, without more, satisfy this definition of harboring. Renting an apartment in the normal course of business is not in and of itself conduct that prevents the government from detecting an alien's presence.

It is true that other Courts of Appeals have held that a showing of concealment is unnecessary, and that conduct which merely "substantially facilitates an alien's remaining in the country illegally" is sufficient to constitute harboring. *See, e.g., United States v. Tipton,* 518 F.3d 591, 595 (8th Cir.2008) (internal alteration omitted). However, even under the more lenient tests of these jurisdictions, we are not aware of any case in which someone has been convicted of "harboring" merely because s/he rented an apartment to someone s/he knew (or had reason to know) was not legally in the United States.

Notably, all the cases cited by Hazleton for that proposition involve defendants who played a much more active role in helping an alien remain in the United States. *See, e.g., Tipton,* 518 F.3d at 595 (defendant *employer* who employed and housed six unauthorized alien employees, provided them with transportation and money to purchase necessities, and maintained counterfeit immigration papers for them guilty of harboring); *United States v. Zheng,* 306

F.3d 1080, 1082 (11th Cir.2002) (defendant *employer* who permitted ten to twenty unauthorized alien employees, who were overworked and underpaid, to live at his house in "barrack-like accommodations" without paying rent guilty of harboring); *Kim,* 193 F.3d at 574-75 (defendant *employer* who advised unauthorized alien employees to change names and acquire false documentation guilty of harboring); *United States v. Sanchez,* 963 F.2d 152, 155 (8th Cir.1992) (defendant *employer* who paid to rent an apartment for unauthorized alien employees, provided them with transportation to and from work, and offered to obtain immigration papers for them guilty of harboring). None of these cases involve anything verging on a simple landlord/tenant relationship. Rather, the fact that so many of these cases involve employers emphasizes that something much more is needed to turn renting a residential unit into harboring.

Furthermore, regardless of the breadth of the term "harboring" in and of itself, there is no question that harboring is illegal under federal law only if a defendant knew or was in reckless disregard of the harbored alien's immigration status. *See* 8 U.S.C. § 1324(a). Hazleton argues that the housing provisions of the IIRAO similarly only prohibit renting to persons known to lack lawful immigration status. This isolated reading of the IIRAO is misleading. Taken together, the IIRAO and the RO not only prohibit the knowing harboring of (defined to include the rental of housing to) certain aliens, but also make

legal immigration status a *qualification* for occupancy of rental housing. Although the typical landlord might never know of her/his tenant's immigration status, Hazleton's provisions collectively require that any provider of rental housing be put on notice about the immigration status of potential renters. *See Lozano,* 496 F.Supp.2d at 493 (Espinal testified that "he understood the ordinances to require that he obtain information on immigration status from tenants that he normally would not seek.").

Although the federal government does not intend for aliens here unlawfully to be harbored, it has never evidenced an intent for them to go homeless. *Cf.* 8 U.S.C. § 1229(a)(1)(F)(i) (explaining that an alien noticed to appear for a removal proceeding must immediately provide the Attorney General "with a written record of an address . . . at which the alien may be contacted respecting [the] proceeding."). Common sense, of course, suggests that Hazleton has absolutely no interest in reducing aliens without legal status to homelessness either. No municipality would benefit from forcing any group of residents ("legal" or "illegal") onto its streets. Rather, it appears plain that the purpose of these housing provisions is to ensure that aliens lacking legal immigration status reside somewhere other than Hazleton. It is this power to effectively prohibit residency based on immigration status that is so clearly within the exclusive domain of the federal government.

In sum, we find the housing provisions of Hazleton's ordinances pre-empted regulations of immigration, and both field and conflict pre-empted by the INA.

VII. CONCLUSION

For the reasons set forth above, we affirm in part and reverse in part the district court's order permanently enjoining Hazleton's enforcement of the IIRAO and the RO.

VIII. APPENDIX

APPENDIX

A. The Illegal Immigration Relief Act Ordinance (Ordinance 2006-18, as amended by Ordinances 2006-40 and 2007-7)

ILLEGAL IMMIGRATION RELIEF ACT ORDINANCE BE IT ORDAINED BY THE COUNCIL OF THE CITY OF HAZLETON AS FOLLOWS:

SECTION 1. TITLE

This chapter shall be known and may be cited as the "City of Hazleton Illegal Immigration Relief Act Ordinance."

SECTION 2. FINDINGS AND DECLARATION OF PURPOSE

The People of the City of Hazleton find and declare:

A. That state and federal law require that certain conditions be met before a person may be authorized to work or reside in this country.

B. That unlawful workers and illegal aliens, as defined by this ordinance and state and federal law, do not normally meet such conditions as a matter of law when present in the City of Hazleton.

C. That unlawful employment, the harboring of illegal aliens in dwelling units in the City of Hazleton, and crime committed by illegal aliens harm the health, safety and welfare of authorized U.S. workers and legal residents in the City of Hazleton. Illegal immigration leads to higher crime rates, subjects our hospitals to fiscal hardship and legal residents to substandard quality of care, contributes to other burdens on public services, increasing their cost and diminishing their availability to legal residents, and diminishes our overall quality of life.

D. That the City of Hazleton is authorized to abate public nuisances and empowered and mandated by the people of Hazleton to abate the nuisance of illegal immigration by diligently prohibiting the acts and policies that facilitate illegal immigration in a

manner consistent with federal law and the objectives of Congress.

E. That United States Code Title 8, subsection 1324(a)(1)(A) prohibits the harboring of illegal aliens. The provision of housing to illegal aliens is a fundamental component of harboring.

F. This ordinance seeks to secure to those lawfully present in the United States and this City, whether or not they are citizens of the United States, the right to live in peace free of the threat crime, to enjoy the public services provided by this city without being burdened by the cost of providing goods, support and services to aliens unlawfully present in the United States, and to be free of the debilitating effects on their economic and social well being imposed by the influx of illegal aliens to the fullest extent that these goals can be achieved consistent with the Constitution and Laws of the United States and the Commonwealth of Pennsylvania.

G. The City shall not construe this ordinance to prohibit the rendering of emergency medical care, emergency assistance, or legal assistance to any person.

SECTION 3. DEFINITIONS

When used in this chapter, the following words, terms and phrases shall have the meanings ascribed to them herein, and shall be construed so as to be

consistent with state and federal law, including federal immigration law:

A. "Business entity" means any person or group of persons performing or engaging in any activity, enterprise, profession, or occupation for gain, benefit, advantage, or livelihood, whether for profit or not for profit.

(1) The term business entity shall include but not be limited to selfemployed individuals, partnerships, corporations, contractors, and subcontractors.

(2) The term business entity shall include any business entity that possesses a business permit, any business entity that is exempt by law from obtaining such a business permit, and any business entity that is operating unlawfully without such a business permit.

B. "City" means the City of Hazleton.

C. "Contractor" means a person, employer, subcontractor or business entity that enters into an agreement to perform any service or work or to provide a certain product in exchange for valuable consideration. This definition shall include but not be limited to a subcontractor, contract employee, or a recruiting or staffing entity.

D. "Illegal Alien" means an alien who is not lawfully present in the United States, according to the terms of United States Code Title 8, section 1101 et seq. The City shall not conclude that a person is an illegal alien

unless and until an authorized representative of the City has verified with the federal government, pursuant to United States Code Title 8, subsection 1373(c), that the person is an alien who is not lawfully present in the United States.

E. "Unlawful worker" means a person who does not have the legal right or authorization to work due to an impediment in any provision of federal, state or local law, including but not limited to a minor disqualified by nonage, or an unauthorized alien as defined by United States Code Title 8, subsection 1324a(h)(3).

F. "Work" means any job, task, employment, labor, personal services, or any other activity for which compensation is provided, expected, or due, including but not limited to all activities conducted by business entities.

G. "Basic Pilot Program" means the electronic verification of work authorization program of the Illegal Immigration Reform and Immigration Responsibility Act of 1996, P.L. 104-208, Division C, Section 403(a); United States Code Title 8, subsection 1324a, and operated by the United States Department of Homeland Security (or a successor program established by the federal government.)

SECTION 4. BUSINESS PERMITS, CONTRACTS, OR GRANTS

A. It is unlawful for any business entity to knowingly recruit, hire for employment, or continue to employ, or to permit, dispatch, or instruct any person who is an unlawful worker to perform work in whole or part within the City. Every business entity that applies for a business permit to engage in any type of work in the City shall sign an affidavit, prepared by the City Solicitor, affirming that they do not knowingly utilize the services or hire any person who is an unlawful worker.

B. Enforcement: The Hazleton Code Enforcement Office shall enforce the requirements of this section.

(1) An enforcement action shall be initiated by means of a written signed complaint to the Hazleton Code Enforcement Office submitted by any City official, business entity, or City resident. A valid complaint shall include an allegation which describes the alleged violator(s) as well as the actions constituting the violation, and the date and location where such actions occurred.

(2) A complaint which alleges a violation on the basis of national origin, ethnicity, or race shall be deemed invalid and shall not be enforced.

(3) Upon receipt of a valid complaint, the Hazleton Code Enforcement Office shall, within three business days, request identity information from the

business entity regarding any persons alleged to be unlawful workers. The Hazleton Code Enforcement Office shall suspend the business permit of any business entity which fails, within three business days after receipt of the request, to provide such information. In instances where an unlawful worker is alleged to be an unauthorized alien, as defined in United States Code Title 8, subsection 1324a(h)(3), the Hazleton Code Enforcement Office shall submit identity data required by the federal government to verify, pursuant to United States Code Title 8, section 1373, the immigration status of such person(s), and shall provide the business entity with written confirmation of that verification.

(4) The Hazleton Code Enforcement Office shall suspend the business permit of any business entity which fails correct a violation of this section within three business days after notification of the violation by the Hazleton Code Enforcement Office.

(5) The Hazleton Code Enforcement Office shall not suspend the business permit of a business entity if, prior to the date of the violation, the business entity had verified the work authorization of the alleged unlawful worker(s) using the Basic Pilot Program.

(6) The suspension shall terminate one business day after a legal representative of the business entity submits, at a City office designated by the City Solicitor, a sworn affidavit stating that the violation has ended.

(a) The affidavit shall include a description of the specific measures and actions taken by the business entity to end the violation, and shall include the name, address and other adequate identifying information of the unlawful workers related to the complaint.

(b) Where two or more of the unlawful workers were verified by the federal government to be unauthorized aliens, the legal representative of the business entity shall submit to the Hazleton Code Enforcement Office, in addition to the prescribed affidavit, documentation acceptable to the City Solicitor which confirms that the business entity has enrolled in and will participate in the Basic Pilot Program for the duration of the validity of the business permit granted to the business entity.

(7) For a second or subsequent violation, the Hazleton Code Enforcement Office shall suspend the business permit of a business entity for a period of twenty days. After the end of the suspension period, and upon receipt of the prescribed affidavit, the Hazleton Code Enforcement Office shall reinstate the business permit. The Hazleton Code Enforcement Office shall forward the affidavit, complaint, and associated documents to the appropriate federal enforcement agency, pursuant to United States Code Title 8, section 1373. In the case of an unlawful worker disqualified by state law not related to immigration, the Hazleton Code Enforcement Office shall forward the affidavit, complaint, and associated

documents to the appropriate state enforcement agency.

C. All agencies of the City shall enroll and participate in the Basic Pilot Program.

D. As a condition for the award of any City contract or grant to a business entity for which the value of employment, labor or, personal services shall exceed $10,000, the business entity shall provide documentation confirming its enrollment and participation in the Basic Pilot Program.

E. Private Cause of Action for Unfairly Discharged Employees (1) The discharge of any employee who is not an unlawful worker by a business entity in the City is an unfair business practice if, on the date of the discharge, the business entity was not participating in the Basic Pilot program and the business entity was employing an unlawful worker.

(2) The discharged worker shall have a private cause of action in the Municipal Court of Hazleton against the business entity for the unfair business practice. The business entity found to have violated this subsection shall be liable to the aggrieved employee for: (a) three times the actual damages sustained by the employee, including but not limited to lost wages or compensation from the date of the discharge until the date the employee has procured new employment at an equivalent rate of compensation, up to a period of one hundred and twenty days; and (b) reasonable attorney's fees and costs.

SECTION 5. HARBORING ILLEGAL ALIENS

A. It is unlawful for any person or business entity that owns a dwelling unit in the City to harbor an illegal alien in the dwelling unit, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, unless such harboring is otherwise expressly permitted by federal law.

(1) For the purposes of this section, to let, lease, or rent a dwelling unit to an illegal alien, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, shall be deemed to constitute harboring. To suffer or permit the occupancy of the dwelling unit by an illegal alien, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, shall also be deemed to constitute harboring.

(2) A separate violation shall be deemed to have been committed on each day that such harboring occurs, and for each adult illegal alien harbored in the dwelling unit, beginning one business day after receipt of a notice of violation from the Hazleton Code Enforcement Office.

(3) A separate violation of this section shall be deemed to have been committed for each business day on which the owner fails to provide the Hazleton Code Enforcement Office with identity data needed to obtain a federal verification of immigration status,

beginning three days after the owner receives written notice from the Hazleton Code Enforcement Office. B.

B. Enforcement: The Hazleton Code Enforcement Office shall enforce the requirements of this section.

(1) An enforcement action shall be initiated by means of a written signed complaint to the Hazleton Code Enforcement Office submitted by any official, business entity, or resident of the City. A valid complaint shall include an allegation which describes the alleged violator(s) as well as the actions constituting the violation, and the date and location where such actions occurred.

(2) A complaint which alleges a violation on the basis of national origin, ethnicity, or race shall be deemed invalid and shall not be enforced.

(3) Upon receipt of a valid written complaint, the Hazleton Code Enforcement Office shall, pursuant to United States Code Title 8, section 1373(c), verify with the federal government the immigration status of a person seeking to use, occupy, lease, or rent a dwelling unit in the City. The Hazleton Code Enforcement Office shall submit identity data required by the federal government to verify immigration status. The City shall forward identity data provided by the owner to the federal government, and shall provide the property owner with written confirmation of that verification.

(4) If after five business days following receipt of written notice from the City that a violation has occurred and that the immigration status of any alleged illegal alien has been verified, pursuant to United States Code Title 8, section 1373(c), the owner of the dwelling unit fails to correct a violation of this section, the Hazleton Code Enforcement Office shall deny or suspend the rental license of the dwelling unit.

(5) For the period of suspension, the owner of the dwelling unit shall not be permitted to collect any rent, payment, fee, or any other form of compensation from, or on behalf of, any tenant or occupant in the dwelling unit.

(6) The denial or suspension shall terminate one business day after a legal representative of the dwelling unit owner submits to the Hazleton Code Enforcement Office a sworn affidavit stating that each and every violation has ended. The affidavit shall include a description of the specific measures and actions taken by the business entity to end the violation, and shall include the name, address and other adequate identifying information for the illegal aliens who were the subject of the complaint.

(7) The Hazleton Code Enforcement Office shall forward the affidavit, complaint, and associated documents to the appropriate federal enforcement agency, pursuant to United States Code Title 8, section 1373.

(8) Any dwelling unit owner who commits a second or subsequent violation of this section shall be subject to a fine of two hundred and fifty dollars ($250) for each separate violation. The suspension provisions of this section applicable to a first violation shall also apply.

(9) Upon the request of a dwelling unit owner, the Hazleton Code Enforcement Office shall, pursuant to United States Code Title 8, section 1373(c), verify with the federal government the lawful immigration status of a person seeking to use, occupy, lease, or rent a dwelling unit in the City. The penalties in this section shall not apply in the case of dwelling unit occupants whose status as an alien lawfully present in the United States has been verified.

SECTION 6. CONSTRUCTION AND SEVERABILITY

A. The requirements and obligations of this section shall be implemented in a manner fully consistent with federal law regulating immigration and protecting the civil rights of all citizens and aliens.

B. If any part of provision of this Chapter is in conflict or inconsistent with applicable provisions of federal or state statutes, or is otherwise held to be invalid or unenforceable by any court of competent jurisdiction, such part of provision shall be suspended

and superseded by such applicable laws or regulations, and the remainder of this Chapter shall not be affected thereby.

SECTION 7. IMPLEMENTATION AND PROCESS

A. *Prospective Application Only.* The default presumption with respect to Ordinances of the City of Hazleton – that such Ordinances shall apply only prospectively – shall pertain to the Illegal Immigration Relief Act Ordinance. The Illegal Immigration Relief Act Ordinance shall be applied only to employment contracts, agreements to perform service or work, and agreements to provide a certain product in exchange for valuable consideration that are entered into or are renewed after the date that the Illegal Immigration Relief Act Ordinance becomes effective and any judicial injunction prohibiting its implementation is removed. The Illegal Immigration Relief Act Ordinance shall be applied only to contracts to let, lease, or rent dwelling units that are entered into or are renewed after the date that the Illegal Immigration Relief Act Ordinance becomes effective and any judicial injunction prohibiting its implementation is removed.

The renewal of a month-to-month lease or other type of tenancy which automatically renews absent notice by either party will not be considered as entering into a new contract to let, lease or rent a dwelling unit.

B. *Condition of Lease.* Consistent with the obligations of a rental unit owner described in Section 5.A., a tenant may not enter into a contract for the rental or leasing of a dwelling unit unless the tenant is either a U.S. citizen or an alien lawfully present in the United States according to the terms of United States Code Title 8, Section 1101 et seq. A tenant who is neither a U.S. citizen nor an alien lawfully present in the United States who enters into such a contract shall be deemed to have breached a condition of the lease under 68 P.S. Section 250.501. A tenant who is not a U.S. citizen who subsequent to the beginning of his tenancy becomes unlawfully present in the United States shall be deemed to have breached a condition of the lease under 68 P.S. Section 250.501.

C. *Corrections of Violations-Employment of Unlawful Workers.* The correction of a violation with respect to the employment of an unlawful worker shall include any of the following actions:

(1) The business entity terminates the unlawful worker's employment.

(2) The business entity, after acquiring additional information from the worker, requests a secondary or additional verification by the federal government of the worker's authorization, pursuant to the procedures of the Basic Pilot Program. While this verification is pending, the three business day period described in Section 4.B.(4) shall be tolled.

(3) The business entity attempts to terminate the unlawful worker's employment and such termination is challenged in a court of the Commonwealth of Pennsylvania. While the business entity pursues the termination of the unlawful worker's employment in such forum, the three business day period described in Section 4.B.(4) shall be tolled.

D. *Corrections of Violations-Harboring Illegal Aliens.* The correction of a violation with respect to the harboring of an illegal alien in a dwelling unit shall include any of the following actions:

(1) A notice to quit, in writing, issued and served by the dwelling unit owner, as landlord, to the tenant declaring a forfeiture of the lease for breach of the lease condition describe in Section 7.B.

(2) The dwelling unit owner, after acquiring additional information from the alien, requests the City of Hazleton to obtain a secondary or additional verification by the federal government that the alien is lawfully present in the United States, under the procedures designated by the federal government, pursuant to United States Code Title 8, Subsection 1373(c). While this second verification is pending, the five business day period described in Section 5.B.(4) shall be tolled.

(3) The commencement of an action for the recovery of possession of real property in accordance with Pennsylvania law by the landlord against the illegal alien. If such action is contested by the tenant in court, the dwelling unit owner shall be deemed to

have complied with this Ordinance while the dwelling unit owner is pursuing the action in court. While this process is pending, the five business day period described in Section 5.B.(4) shall be tolled.

E. *Procedure if Verification is Delayed.* If the federal government notifies the City of Hazleton that it is unable to verify whether a tenant is lawfully present in the United States or whether an employee is authorized to work in the United States, the City of Hazleton shall take no further action on the complaint until a verification from the federal government concerning the status of the individual is received. At no point shall any City official attempt to make an independent determination of any alien's legal status, without verification from the federal government, pursuant to United States Code Title 8, Subsection 1373(c).

F. *Venue for Judicial Process.* Any business entity or rental unit owner subject to a complaint and subsequent enforcement under this ordinance, or any employee of such a business entity or tenant of such a rental unit owner, may challenge the enforcement of this Ordinance with respect to such entity or individual in the Magisterial District Court for the City of Hazleton, subject to the right of appeal to the Luzerne County Court of Common Pleas. Such an entity or individual may alternatively challenge the enforcement of this Ordinance with respect to such entity or individual in any other court of competent jurisdiction in accordance with applicable law, subject to all rights of appeal.

G. *Deference to Federal Determinations of Status.* The determination of whether a tenant of a dwelling is lawfully present in the United States, and the determination of whether a worker is an unauthorized alien shall be made by the federal government, pursuant to United States Code Title 8, Subsection 1373(c). A determination of such status of an individual by the federal government shall create a rebuttable presumption as to that individual's status in any judicial proceedings brought pursuant to this ordinance. The Court may take judicial notice of any verification of the individual previously provided by the federal government and may request the federal government to provide automated or testimonial verification pursuant to United States Code Title 8, Subsection 1373(c).

B. Rental Registration Ordinance

(Ordinance 2006-13)

ESTABLISHING A REGISTRATION PROGRAM FOR RESIDENTIAL RENTAL PROPERTIES; REQUIRING ALL OWNERS OF RESIDENTIAL RENTAL PROPERTIES TO DESIGNATE AN AGENT FOR SERVICE OF PROCESS; AND PRESCRIBING DUTIES OF OWNERS, AGENTS AND OCCUPANTS; DIRECTING THE DESIGNATION OF AGENTS; ESTABLISHING FEES FOR THE COSTS ASSOCIATED WITH THE REGISTRATION OF RENTAL PROPERTY; AND PRESCRIBING PENALTIES FOR VIOLATIONS BE IT ORDAINED

BY THE GOVERNING BODY OF THE CITY OF HAZLETON AND IT IS HEREBY ORDAINED AND WITH THE AUTHORITY OF THE SAME AS FOLLOWS:

SECTION 1. DEFINITIONS AND INTERPRETATION.

The following words, when used in this ordinance, shall have the meanings ascribed to them in this section, except in those instances where the context clearly indicates otherwise. When not inconsistent with the context, words used in the present tense include the future; words in the plural number include the singular number; words in the singular shall include the plural, and words in the masculine shall include the feminine and the neuter.

a. AGENT – Individual of legal majority who has been designated by the Owner as the agent of the Owner or manager of the Property under the provisions of this ordinance.

b. CITY – City of Hazleton

c. CITY CODE – the building code (property Maintenance Code 1996 as amended or superceded) officially adopted by the governing body of the City, or other such codes officially designated by the governing body of the City for the regulation of construction, alteration, addition, repair, removal, demolition, location, occupancy and maintenance of buildings and structures.

d. ZONING ORDINANCE – Zoning ordinance as officially adopted by the City of Hazleton, File of Council # 95-26 (as amended).

e. OFFICE – The Office of Code Enforcement for the City of Hazleton.

f. DWELLING UNIT – a single habitable unit, providing living facilities for one or more persons, including permanent space for living, sleeping, eating, cooking and bathing and sanitation, whether furnished or unfurnished. There may be more than one Dwelling Unit on a Premises.

g. DORMITORY – a residence hall offered as student or faculty housing to accommodate a college or university, providing living or sleeping rooms for individuals or groups of individuals, with or without cooking facilities and with or without private baths.

h. INSPECTOR – any person authorized by Law or Ordinance to inspect buildings or systems, e.g. zoning, housing, plumbing, electrical systems, heat systems, mechanical systems and health necessary to operate or use buildings within the City of Hazleton. An Inspector would include those identified in Section 8-Enforcement.

i. FIRE DEPARTMENT – the Fire Department of the City of Hazleton or any member thereof, and includes the Chief of Fire or his designee.

j. HOTEL – a building or part of a building in which living and sleeping accommodations are used primarily for transient occupancy, may be rented on a

daily basis, and desk service is provided, in addition to one or more of the following services: maid, telephone, bellhop service, or the furnishing or laundering of linens.

k. LET FOR OCCUPANCY – to permit, provide or offer, for consideration, possession or occupancy of a building, dwelling unit, rooming unit, premise or structure by a person who is not the legal owner of record thereof, pursuant to a written or unwritten lease, agreement or license, or pursuant to a recorded or unrecorded agreement or contract for the sale of land.

l. MOTEL – a building or group of buildings which contain living and sleeping accommodations used primarily for transient occupancy, may be rented on a daily basis, and desk service is provided, and has individual entrances from outside the building to serve each such living or sleeping unit.

m. OCCUPANT – a person age 18 or older who resides at a Premises.

n. OPERATOR – any person who has charge, care or control of a Premises which is offered or let for occupancy.

o. OWNER – any Person, Agent, or Operator having a legal or equitable interest in the property; or recorded in the official records of the state, county, or municipality as holding title to the property; or otherwise having control of the property, including the guardian of the estate of any such person, and the

executor or administrator of the estate of such person if ordered to take possession of real property by a Court of competent jurisdiction.

p. OWNER-OCCUPANT – an owner who resides in a Dwelling Unit on a regular permanent basis, or who otherwise occupies a nonresidential portion of the Premises on a regular permanent basis.

q. PERSON – any person, partnership, firm, association, corporation, or municipal authority or any other group acting as a single unit.

r. POLICE DEPARTMENT – the Police Department of the City of Hazleton or any member thereof sworn to enforce laws and ordinances in the City, and includes the Chief of Police or his designee.

s. PREMISES – any parcel of real property in the City, including the land and all buildings and structures in which one or more Rental Units are located.

t. RENTAL UNIT – means a Dwelling Unit or Rooming Unit which is Let for Occupancy and is occupied by one or more Tenants.

u. ROOMING UNIT – any room or groups of rooms forming a single habitable unit occupied or intended to be occupied for sleeping or living, but not for cooking purposes.

v. TENANT – any Person authorized by the Owner or Agent who occupies a Rental Unit within a

Premises regardless of whether such Person has executed a lease for said Premises.

SECTION 2. APPOINTMENT OF AN AGENT AND/OR MANAGER

Each Owner who is not an Owner-occupant, or who does not reside in the City of Hazleton or within a ten (10) mile air radius of the City limits, shall appoint an Agent who shall reside in the City or within a ten (10) mile air radius of the City limits.

SECTION 3. DUTIES OF THE OWNER AND/OR AGENT

a. The Owner has the duty to maintain the Premises in good repair, clean and sanitary condition, and to maintain the Premises in compliance with the current Codes, Building Codes and Zoning Ordinance of the City of Hazleton. The Owner may delegate implementation of these responsibilities to an Agent.

b. The duties of the Owner and/or Agent shall be to receive notices and correspondence, including service of process, from the City of Hazleton; to arrange for the inspection of the Rental Units; do or arrange for the performance of maintenance, cleaning, repair, pest control, snow and ice removal, and ensure continued compliance of the Premises with the current Codes, Building Codes and Zoning Ordinance in effect in the City of Hazleton, as well as arrange for garbage removal.

c. The name, address and telephone number of the Owner and Agent, if applicable, shall be reported to the Code Enforcement Office in writing upon registering the Rental Units.

d. No Dwelling Unit shall be occupied, knowingly by the Owner or Agent, by a number of persons that is in excess of the requirements outlined in 2003 International Property Maintenance Code, Chapter 4, Light, Ventilation, and Occupancy Limits, Section PM-404.5, Overcrowding, or any update thereof, a copy of which is appended hereto and made a part hereof.

SECTION 4. NOTICES

a. Whenever an Inspector or Code Enforcement Officer determines that any Rental Unit or Premises fails to meet the requirements set forth in the applicable Codes, the Inspector or Code Enforcement Officer shall issue a correction notice setting forth the violations and ordering the Occupant, Owner or Agent, as appropriate, to correct such violations.

The notice shall:

1) Be in writing;

2) Describe the location and nature of the violation;

3) Establish a reasonable time for the correction of the violation.

b. All notices shall be served upon the Occupant, Owner or Agent, as applicable, personally or by certified mail, return receipt requested. A copy of any notices served solely on an Occupant shall also be provided to the Owner or Agent. In the event service is first attempted by mail and the notice is returned by the postal authorities marked "unclaimed" or "refused", then the Code Enforcement Office or Police Department shall attempt delivery by personal service on the Occupant, Owner or Agent, as applicable. The Code Enforcement Office shall also post the notice at a conspicuous place on the Premises. If personal service directed to the Owner or Agent cannot be accomplished after a reasonable attempt to do so, then the notice may be sent to the Owner or Agent, as applicable, at the address stated on the most current registration application for the Premises in question, by regular first class mail, postage prepaid. If such notice is not returned by the postal authorities within five (5) days of its deposit in the U.S. Mail, then it shall be deemed to have been delivered to and received by the addressee on the fifth day following its deposit in the United States Mail.

c. For purposes of this Ordinance, any notice hereunder that is given to the Agent shall be deemed as notice given to the Owner.

d. There shall be a rebuttable presumption that any notice that is given to the Occupant, Owner or Agent under this ordinance shall have been received by such Occupant, Owner or Agent if the notice was served in the manner provided by this ordinance.

e. Subject to paragraph 4.d above, a claimed lack of knowledge by the Owner or Agent, if applicable, of any violation hereunder cited shall be no defense to closure of rental units pursuant to Section 9, as long as all notices prerequisite to such proceedings have been given and deemed received in accordance with the provisions of this ordinance.

f. All notices shall contain a reasonable time to correct, or take steps to correct, violations of the above. The Occupant, Owner or Agent to whom the notice was addressed may request additional time to correct violations. Requests for additional time must be in writing and either deposited in the U.S. Mail (post-marked) or hand-delivered to the Code Enforcement Office within five (5) days of receipt of the notice by the Occupant, Owner or Agent. The City retains the right to deny or modify time extension requests. If the Occupant, Owner or Agent is attempting in good faith to correct violations but is unable to do so within the time specified in the notice, the Occupant, Owner or Agent shall have the right to request such additional time as may be needed to complete the correction work, which request shall not be unreasonably withheld.

g. Failure to correct violations within the time period stated in the notice of violation shall result in such actions or penalties as are set forth in Section 10 of this ordinance. If the notice of violation relates to actions or omissions of the Occupant, and the Occupant fails to make the necessary correction, the Owner or Agent may be required to remedy the

condition. No adverse action shall be taken against an Owner or Agent for failure to remedy a condition so long as the Owner or Agent is acting with due diligence and taking bona fide steps to correct the violation, including but not limited to pursuing remedies under a lease agreement with an Occupant or Tenant. The City shall not be precluded from pursuing an enforcement action against any Occupant or Tenant who is deemed to be in violation.

SECTION 5. INSURANCE

In order to protect the health, safety and welfare of the residents of the City, it is hereby declared that the city shall require hazard and general liability insurance for all property owners letting property for occupancy in the City.

a. Minimum coverage; use of insurance proceeds. All Owners shall be required to obtain a minimum of fifty thousand ($50,000.00) dollars in general liability insurance, and hazard and casualty insurance in an amount sufficient to either restore or remove the building in the event of a fire or other casualty. Further, in the event of any fire or loss covered by such insurance, it shall be the obligation of the Owner to use such insurance proceeds to cause the restoration or demolition or other repair of the property in adherence to the City Code and all applicable ordinances.

b. Property owners to provide City with insurance information. Owners shall be required to place

their insurance company name, policy number and policy expiration date on their Rental Property Registration form, or in the alternative, to provide the Code Enforcement Office with a copy of a certificate of insurance. A registration Certificate (see Section 6 below) shall not be issued to any Owner or Agent unless the aforementioned information has been provided to the Code Enforcement Office. The Code Enforcement Office shall be informed of any change in policies for a particular rental property or cancellation of a policy for said property within thirty (30) days of said change or cancellation.

SECTION 6. RENTAL REGISTRATION AND LICENSE REQUIREMENTS

a. No Person shall hereafter occupy, allow to be occupied, advertise for occupancy, solicit occupants for, or let to another person for occupancy any Rental Unit within the City for which an application for license has not been made and filed with the Code Enforcement Office and for which there is not an effective license. Initial application and renewal shall be made upon forms furnished by the Code Enforcement Office for such purpose and shall specifically require the following minimum information:

1) Name, mailing address, street address and phone number of the Owner, and if the Owner is not a natural person, the name, address and phone number of a designated representative of the Owner.

2) Name, mailing address, street address and phone number of the Agent of the Owner, if applicable.

3) The street address of the Premises being registered.

4) The number and types of units within the Premises (Dwelling Units or Rooming Units) The Owner or Agent shall notify the Code Enforcement Office of any changes of the above information within thirty (30) days of such change.

b. The initial application for registration and licensing shall be made by personally filing an application with the Code Enforcement Office by November 1, 2006. Thereafter, any new applicant shall file an application before the Premises is let for occupancy, or within thirty (30) days of becoming an Owner of a currently registered Premises. One application per property is required, as each property will receive its own license.

c. Upon receipt of the initial application or any renewal thereof and the payment of applicable fees as set forth in Section 7 below, the Code Enforcement Office shall issue a Rental Registration License to the Owner within thirty (30) days of receipt of payment.

d. Each new license issued hereunder, and each renewal license, shall expire on October 31 of each year. The Code Enforcement Office shall mail license renewal applications to the Owner or designated Agent on or before September 1 of each year. Renewal

applications and fees may be returned by mail or in person to the Code Enforcement Office. A renewal license will not be issued unless the application and appropriate fee has been remitted.

SECTION 7. FEES.

a. Annual License Fee. There shall be a license fee for the initial license and an annual renewal fee thereafter. Fees shall be assessed against and payable by the Owner in the amount of $5.00 per Rental Unit, payable at the time of initial registration and annual renewal, as more specifically set forth in Section 6 above.

b. Occupancy Permit Fee. There shall be a one-time occupancy permit fee of $10.00 for every new Occupant, which is payable by the Occupant. For purposes of initial registration under this ordinance, this fee shall be paid for all current Occupants by November 1, 2006. Thereafter, prior to occupying any Rental Unit, all Occupants shall obtain an occupancy permit. It shall be the Occupant's responsibility to submit an occupancy permit application to the Code Enforcement Office, pay the fee and obtain the occupancy permit. If there are multiple Occupants in a single Rental Unit, each Occupant shall obtain his or her own permit. Owner or Agent shall notify all prospective Occupants of this requirement and shall not permit occupancy of a Rental Unit unless the Occupant first obtains an occupancy permit. Each occupancy permit issued is valid only for the

Occupant for as long as the Occupant continues to occupy the Rental Unit for which such permit was applied. Any relocation to a different Rental Unit requires a new occupancy permit. All Occupants age 65 and older, with adequate proof of age, shall be exempt from paying the permit fee, but shall be otherwise required to comply with this section and the rest of the Ordinance.

1. Application for occupancy permits shall be made upon forms furnished by the Code Enforcement Office for such purpose and shall specifically require the following minimum information:

a) Name of Occupant

b) Mailing address of Occupant

c) Street address of Rental Unit for which Occupant is applying, if different from mailing address

d) Name of Landlord

e) Date of lease commencement

f) Proof of age if claiming exemption from the permit fee

g) Proper identification showing proof of legal citizenship and/or residency

2. Upon receipt of the application and the payment of applicable fees as set forth above, the Code Enforcement Office shall issue an Occupancy Permit to the Occupant immediately.

SECTION 8. ENFORCEMENT

a. The following persons are hereby authorized to enforce this Ordinance:

1. The Chief of Police
2. Any Police Officer
3. Code Enforcement Officer
4. The Fire Chief
5. Deputy Fire Chief of the City of Hazleton.
6. Health Officer
7. Director of Public Works

b. The designation of any person to enforce this Ordinance or authorization of an Inspector, when in writing, and signed by a person authorized by Section 8.a to designate or authorize an Inspector to enforce this Ordinance, shall be prima facie evidence of such authority before the Magisterial District Judge, Court of Common Pleas, or any other Court, administrative body of the City, or of this commonwealth, and the designating Director or Supervisor need not be called as a witness thereto.

SECTION 9. FAILURE TO CORRECT VIOLATIONS.

If any Person shall fail, refuse or neglect to comply with a notice of violation as set forth in Section 4 above, the City shall have the right to file an

enforcement action with the Magisterial District Judge against any Person the City deems to be in violation. If, after hearing, the Magisterial District Judge determines that such Person or Persons are in violation, the Magisterial District Judge may, at the City's request, order the closure of the Rental Unit(s), or assess fines in accordance with Section 10 below, until such violations are corrected. Such order shall be stayed pending any appeal to the Court of Common Pleas of Luzerne County.

SECTION 10. FAILURE TO COMPLY WITH THIS ORDINANCE; PENALTIES

a. Except as provided in subsections 10.b and 10.c below, any Person who shall violate any provision of the Ordinance shall, upon conviction thereof after notice and a hearing before the Magisterial District Judge, be sentenced to pay a fine of not less than $100.00 and not more than $300.00 plus costs, or imprisonment for a term not to exceed ninety (90) days in default of payment. Every day that a violation of this Ordinance continues shall constitute a separate offense, provided, however, that failure to register or renew or pay appropriate fees in a timely manner shall not constitute a continuing offense but shall be a single offense not subject to daily fines.

b. Any Owner or Agent who shall allow any Occupant to occupy a Rental Unit without first obtaining an occupancy permit is in violation of Section 7.b and shall, upon conviction thereof after notice and

a hearing before the Magisterial District Judge, be sentenced to pay a fine of $1,000 for each Occupant that does not have an occupancy permit and $100 per Occupant per day for each day that Owner or Agent continues to allow each such Occupant to occupy the Rental Unit without an occupancy permit after Owner or Agent is given notice of such violation pursuant to Section 4 above. Owner or Agent shall not be held liable for the actions of Occupants who allow additional occupancy in any Rental Unit without the Owner or Agent's written permission, provided that Owner or Agent takes reasonable steps to remove or register such unauthorized Occupant(s) within ten (10) days of learning of their unauthorized occupancy in the Rental Unit.

c. Any Occupant having an occupancy permit but who allows additional occupancy in a Rental Unit without first obtaining the written permission of the Owner or Agent and without requiring each such additional Occupant to obtain his or her own occupancy permit is in violation of Section 7.b of this ordinance and shall, upon conviction thereof after notice and a hearing before the Magisterial District Judge, be sentenced to pay a fine of $1,000 for each additional Occupant permitted by Occupant that does not have an occupancy permit and $100 per additional Occupant per day for each day that Occupant continues to allow each such additional Occupant to occupy the Rental Unit without an occupancy permit after Occupant is given written notice of such

violation by Owner or Agent or pursuant to Section 4 above.

SECTION 11. APPLICABILITY AND EXEMPTIONS TO THE ORDINANCE

The provisions of the ordinance shall not apply to the following properties, which are exempt from registration and license requirements:

a. Hotels, Motels and Dormitories.

b. Rental Units owned by Public Authorities as defined under the Pennsylvania Municipal Authorities Act, and Dwelling Units that are part of an elderly housing multi-unit building which is 75% occupied by individuals over the age of sixty-five.

c. Multi-dwelling units that operate under Internal Revenue Service Code Section 42 concerning entities that operate with an elderly component.

d. Properties which consist of a double home, half of which is let for occupancy and half of which is Owner-occupied as the Owner's residence.

SECTION 12. CONFIDENTIALITY OF INFORMATION

All registration information collected by the City under this Ordinance shall be maintained as confidential and shall not be disseminated or released to

any individual, group or organization for any purpose except as provided herein or required by law. Information may be released only to authorized individuals when required during the course of an official City, state or federal investigation or inquiry.

SECTION 13. SAVINGS CLAUSE

This ordinance shall not affect violations of any other ordinance, code or regulation existing prior to the effective date thereof and any such violations shall be governed and shall continue to be punishable to the full extent of the law under the provisions of those ordinances, codes or regulations in effect at the time the violation was committed.

SECTION 14. SEVERABILITY

If any section, clause, provision or portion of this Ordinance shall be held invalid or unconstitutional by any Court of competent jurisdiction, such decision shall not affect any other section, clause, provision or portion of this Ordinance so long as it remains legally enforceable without the invalid portion. The City reserves the right to amend this Ordinance or any portion thereof from time to time as it shall deem advisable in the best interest of the promotion of the purposes and intent of this Ordinance, and the effective administration thereof.

SECTION 15. EFFECTIVE DATE

This Ordinance shall become effective immediately upon approval. This Ordinance repeals Ordinance number 2004-11 and replaces same in its entirety.

SECTION 16.

This Ordinance is enacted by the Council of the City of Hazleton under the authority of the Act of Legislature, April 13, 1972, Act No. 62, known as the "Home Rule Charter and Optional Plans Law", and all other laws enforceable the State of Pennsylvania.

Parallel Citations

31 IER Cases 129

496 F.Supp.2d 477

United States District Court,
M.D. Pennsylvania.

Pedro LOZANO, Humberto Hernandez, Rosa Lechuga, Jose Luis Lechuga, John Doe 1, John Doe 3, John Doe 7, Jane Doe 5, Casa Dominica of Hazleton, Inc., Hazleton Hispanic Business Association, and Pennsylvania Statewide Latino Coalition, Plaintiffs

v.

CITY OF HAZLETON, Defendant

No. 3:06cv1586.

July 26, 2007.

David Vaida, Law Office of David Vaida, Allentown, PA, Denise Alvarez, Foster Maer, Ghita Schwarz, Jackson Chin, Richard Bellman, Puerto Rican Legal Defense and Education Fund, New York, NY, Doreen Y. Trujillo, Ilan Rosenberg, Linda S. Kaiser, Thomas B. Fiddler, Thomas G. Wilkinson, Jr., William J. Taylor, Cozen O'Connor, Philadelphia, PA, Douglas W. Frankenthaler, Cozen O'Connor, Cherry Hill, NJ, Elena Park, Cozen O'Connor, West Conshohocken, PA, George R. Barron, Wilkes-Barre, PA, Jennifer C. Chang, American Civil Liberties Union Foundation, Lucas Guttentag, San Francisco, CA, Lee Gelernt, Omar C. Jadwat, American Civil Liberties Union Foundation, New York, NY, Mary Catherine Roper, American Civil Liberties Union of Pennsylvania, Philadelphia, PA, Witold J. Walczak, American Civil Liberties Union of PA, Pittsburgh, PA, Laurence E. Norton, II, Peter Zurflieh, Shamaine A. Daniels,

Community Justice Project, Harrisburg, PA, for Plaintiffs.

Carla P. Maresca, Harry G. Mahoney, Andrew B. Adair, Deasey, Mahoney & Bender, Ltd., Philadelphia, PA, Kris W. Kobach, Kansas City, MI, Michael M. Hethmon, Immigration Reform Law Institute, Washington, DC, William Perry Pendley, Elizabeth Gallaway, Mountain States Legal Foundation, Lakewood, CO, for Defendant.

DECISION

MUNLEY, District Judge.

This case addresses Defendant City of Hazleton's authority to enact ordinances that regulate the presence and employment of illegal aliens.[1] Before the court for disposition is plaintiffs' complaint challenging the validity of those ordinances. Trial has been held on this matter, and the parties have filed briefs setting forth their respective positions. The matter is thus ripe for disposition.

Background including findings of fact

Defendant City of Hazleton is located in Luzerne County in northeastern Pennsylvania. The city's

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[1] The parties vary in their use of the terms "illegal alien," "unauthorized alien," "illegal immigrant" and "undocumented alien." We will use the terms interchangeably.

executive is a mayor and the city's legislature is a city council. Under Pennsylvania law, Hazleton is a City of the Third Class and operates under an Optional Plan B form of government. (Notes of trial testimony (hereinafter "N.T") 3/15/07 at 204-05).

At the time of the 2000 census, Hazleton's population was 23,000. (N.T. 3/16/07 at 145-46). Since 2000, Hazleton's population has increased sharply, and now has an estimated 30,000 to 33,000 residents. (P-148, 2007 Budget Proposal, at 1-2; N.T. 3/19/07 at 163-64).

The increase in Hazleton's population can be explained largely by a recent influx of immigrants, most of whom are Latino. (N.T. 3/16/07 at 146). After the September 11, 2001 terrorist attacks, many Latino families moved from New York and New Jersey to Hazleton seeking a better life, employment and affordable housing. (N.T. 3/12/07 at 66-67; N.T. 3/14/07 at 29-30). Those moving to Hazleton included United States citizens, lawful permanent residents and undocumented immigrants. (N.T. 3/13/07 at 161; N.T. 3/14/07 at 29-30).

The number of undocumented immigrants in Hazleton is unknown. (N.T. 3/16/07 at 146). Immigrants, both legal and undocumented, support the local economy through consumer spending, paying rent and paying sales taxes. (N.T. 3/14/07 at 67-70).

Beginning on July 13, 2006, the City of Hazleton enacted numerous ordinances aimed at combating what the city viewed as the problems created by the

presence of "illegal aliens." On July 13, 2006, Ordinance 2006-10, the city's first version of its "Illegal Immigration Relief Act Ordinance" was passed. This ordinance prohibits the employment and harboring of undocumented aliens in the City of Hazleton. On August 15, 2006, the city passed the "Tenant Registration Ordinance," Ordinance 2006-13 ("RO"). This ordinance requires apartment dwellers to obtain an occupancy permit. To receive such a permit, they must prove they are citizens or lawful residents.

On September 21, 2006, Hazleton enacted Ordinance 2006-18, entitled the "Illegal Immigration Relief Act Ordinance" ("IIRA") and Ordinance 2006-19, the "Official English Ordinance." These two ordinances replaced the original Illegal Immigration Relief Act. On December 28, 2006, Hazleton enacted Ordinance 2006-40, which amended IIRA by adding an "implementation and process" section. During the trial of the above matter, the city enacted the final ordinance at issue in this case, Ordinance 2007-6, which made minor, but important, changes to the language of portions of IIRA.[2]

At issue in the instant case are IIRA[3] and RO.[4] IIRA defines "illegal alien" as an "alien who is not

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[2] Ordinance 2007-6 eliminated the phrase "solely and primarily" from sections 4.B.2 and 5.B.2 of IIRA and inserted the word "knowingly" to section 4.A of Ordinance 2006-18.

[3] For the remainder of the opinion we will refer to Ordinance 2006-18, as amended by Ordinance 2006-40 and Ordinance 2007-6 collectively as "IIRA" or "Ordinance."

[4] The details of these ordinances are discussed more fully below where appropriate.

lawfully present in the United States, according to the terms of United States Code Title 8, section 1101 et seq." (IIRA § 3.D.). Title 8, section 1101, *et seq.* is commonly referred to as the Immigration and Nationality Act or "INA". The INA provides no definition for the term "illegal alien" or the term "lawfully present." (N.T. 3/19/07 at 130).

Generally, under federal law, aliens can be present in the country as: 1) lawfully admitted non-immigrants, i.e., visitors, those in the country temporarily; and 2) lawful immigrants, lawful permanent residents, referred to sometimes as "green card holders." (N.T. 3/19/07 at 112-13). Lawfully admitted for permanent residence status can be attained in various ways, including family or employment characteristics, the "green card lottery" or relief such as asylum. (*Id.* at 112-13).

A third category of aliens present in the country are "undocumented aliens" who lack lawful immigration status. These aliens may have overstayed their time in the United States or entered the country illegally. (*Id.* at 113). The number of these individuals is approximately twelve million. (*Id.*). Hazleton's use of the term "illegal alien" evidently is aimed at these individuals.

On August 15, 2006, plaintiffs filed the instant action to challenge the validity of the Hazleton ordinances. On October 30, 2006, an amended complaint was filed along with a motion for a preliminary injunction and temporary restraining order seeking to enjoin the defendant from enforcing the ordinances.

On October 31, 2006, the court granted the plaintiffs' request for a Temporary Restraining Order. (Doc. 35). The court ordered that the Temporary Restraining Order remain in effect until November 14, 2006 and scheduled a hearing on the preliminary injunction motion for November 13, 2006. (Doc. 36). In order to conduct discovery and fully brief the issues raised in the amended complaint, the parties entered into a stipulation to extend the Temporary Restraining Order for 120 days or until trial and resolution of the matter. (Doc. 39).

On January 12, 2007, plaintiffs filed a second amended complaint. (Doc. 82). The second amended complaint seeks a declaratory judgment that IIRA and RO violate the Supremacy Clause, the Due Process Clause and the Equal Protection Clause of the Constitution of the United States. Plaintiffs also claim that the ordinances violate 42 U.S.C. § 1981; the Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.*; plaintiffs' privacy rights; Pennsylvania's Home Rule Charter Law, 53 PA. CONS.STAT. §§ 2961; *et seq.*, the Landlord and Tenant Act 68 PENN. STAT.. §§ 250.101 et seq.; and its police powers.

The following plaintiffs filed the second amended complaint:

> – Pedro Lozano, a lawful permanent resident of the United States, who immigrated from Colombia in January 2002 in search of a better life. (N.T. 3/12/07 at 161). He served as an official in the National Police force for thirty-five years in Colombia. (N.T. 3/12/07 at

162). He moved to Hazleton from New York City to find affordable housing and better employment. (N.T. 3/12/07 at 164).

– Jose Luis Lechuga and his wife, Rosa Lechuga, who immigrated illegally to the United States from Mexico in 1982 to forge a better life for themselves and their children. (N.T. 3/12/07 at 118-119). In the late 1980s, they received amnesty and became lawful permanent residents. (N.T. 3/12/07 at 119-120). In 1991, the Lechugas moved to Hazleton for its employment opportunities. (N.T. 3/12/2007 at 122-123).

– Humberto Hernandez is listed in the complaint as a plaintiff. (Doc. 81, ¶¶ 3-4). Plaintiffs presented no testimony at trial regarding Hernandez; therefore, he will be dismissed.

– John Doe 1 has lived in Hazleton for six years, but was born in Mexico. (*See* Doc. 189, Dep. John Doe 1 at 12). John Doe 1 is not a United States citizen or legal permanent resident, though his father filed a document with the federal government seeking to change his immigration status. (*Id.* at 16, 19). John Doe 1 is unsure of his immigration status, though he thought that the federal government could order him removed from the country. (*Id.* at 22). John Doe 1 is also unsure of whether he has legal authorization to work. (*Id.*).

– John Doe 3 moved to Hazleton four years ago. (Doc. 190, Dep. John Doe 3 at 8). He is

not a U.S. citizen or a lawful permanent resident. (*Id.* at 11).

– Jane Doe 5 and John Doe 7 moved to Hazleton more than five years ago. (Doc. 191, Dep. Jane Doe 5 at 13). Neither is a U.S. citizen nor a lawful permanent resident. (Doc. 191, Dep. Jane Doe 5 at 15, Doc. 192, Dep. John Doe 7 at 10-11). They were both born in Colombia, where John Doe 7 worked as an architect, and have been married for over twenty-eight years. (Doc. 191, Dep. Jane Doe 5 at 16, Doc. 192, Dep. John Doe 7 at 9-11).

– Hazleton Hispanic Business Association is an organization comprised of approximately twenty-seven Hispanic business and property owners from the Hazleton area. (N.T. 3/12/07 at 77, 78, 80, 98). Members include landlords in the city of Hazleton. (*Id.* at 98).

– Pennsylvania Statewide Latino Coalition is a not-for-profit organization with a mission to promote the social, political, economic and cultural development of Pennsylvania Latinos and to develop leadership and create networks among Latino leaders and communities. (N.T. 3/12/07 at 20-22).

– Casa Dominicana de Hazleton, Inc. is an organization that provides assistance, orientation and education to the Latino community in Hazleton and attempts to unify ties between the Latino and non-Latino communities. (N.T. 3/14/07 at 7-9). It provides members with information, legal referrals and assistance with economic difficulties. (*Id.* at 8-9). It also

works to keep youth from joining gangs. (Vol.3, 27-28).[5]

Plaintiffs seek an injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure enjoining Hazleton from implementing or enforcing the ordinances. Additionally, plaintiffs seek the costs incurred in this litigation including attorneys' fees pursuant to 42 U.S.C. § 1988.

On January 23, 2007, defendant filed a motion to dismiss the second amended complaint. (Doc. 84). Plaintiffs filed a brief in opposition to the motion to dismiss and a motion for summary judgment on February 12, 2007. (Doc. 106). On February 22, 2007, we held a pretrial conference where we indicated that we would consolidate the motion to dismiss and the motion for summary judgment into the trial. Defendant filed a memorandum in opposition to the summary judgment motion on March 2, 2007. (Doc. 150).

The court held a hearing on the preliminary injunction motion from March 12, 2007 through March 22, 2007. We notified the parties that this hearing would be the final trial on the injunctive matter. *See* FED. R. CIV. PRO. 65(a)(2) ("Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced

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[5] Further factual findings are made below where appropriate. However, as most of the issues we face are purely legal, we need not make extensive factual findings.

and consolidated with the hearing of the application."). After the completion of the trial transcript on April 20, 2007, the parties submitted their post-trial briefs on May 14, 2007. (Doc. 218, 219). The matter is thus ripe for disposition.

Jurisdiction

As this case is brought pursuant to federal statutes and the federal constitution, we have jurisdiction pursuant to 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."). We have authority to issue a declaratory judgment under 28 U.S.C. § 2201 (explaining that "any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration[.]"). We have supplemental jurisdiction over the plaintiffs' state law claims pursuant to 28 U.S.C. § 1367.

Discussion

Before we address the merits of plaintiffs' complaint we must address several preliminary matters. These matters include standing, the propriety of several plaintiffs proceeding anonymously and which version of the ordinances should be addressed.

I. Preliminary issues

A. Standing

Defendant argues that all plaintiffs lack standing to bring this lawsuit. Courts have identified two types of standing, constitutional and prudential, and defendant contends that plaintiffs fail to meet the requirements of either type. We will address each in turn.

1. Constitutional Standing

"No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 37, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976). Standing provides "justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). The Supreme Court has held that "the standing question in its Art. III aspect is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf.'" *Simon*, 426 U.S. at 38, 96 S.Ct. 1917 (quoting *Warth*, 422 U.S. at 498-99, 95 S.Ct. 2197). The Court has described three elements that comprise the "irreducible constitutional minimum of standing." *Lujan v.*

Defenders of Wildlife, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). A plaintiff must first "have suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized [citations omitted] and (b) 'actual or imminent', not 'conjectural or hypothetical.'" *Id.* (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 102, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983)). The injury suffered by the plaintiff must also be causally connected to the conduct of which the plaintiff complains: "the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court.'" *Id.* (quoting *Simon*, 426 U.S. at 41-42, 96 S.Ct. 1917). Finally, "it must be 'likely' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* (quoting *Id.* at 38, 43, 96 S.Ct. 1917).

"The party invoking federal jurisdiction bears the burden" of proof to demonstrate standing. *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130. The level of proof required of a party conforms to "the manner and degree of evidence required at the successive stages of the litigation." *Id.* In the initial stage of the litigation, when the plaintiff need only meet the pleading standards, "general factual allegations of injury resulting from the defendant's conduct may suffice." *Id.* When the issue in question is summary judgment, though, "the plaintiff can no longer rest on such 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts,' which for purposes of the

summary judgment motion will be taken as true." *Id.* (quoting FED.R.CIV.P. 56(e)). At trial, "those facts (if controverted) must be 'supported adequately by the evidence adduced at trial.'" *Id.* (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 115 n. 31, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979)).

a. Named Plaintiffs

i. Landlord Plaintiffs

Defendant argues that the landlord plaintiffs lack standing to bring this suit.[6] Those plaintiffs, defendant claims, did not suffer an injury caused by the ordinances which this court could redress. Plaintiff Pedro Lozano, a native of Columbia who is a legal resident of the United States, lives in Hazleton. (N.T. 3/12/07 at 161, 163). Lozano and his wife purchased a two-family home in Hazleton in April 2005. (*Id.* at 164). They planned to rent half of the house to "have assistance with the mortgage." (*Id.* at 164). This rental property, Lozano insists, forms the basis for his standing in this case. The defendant disputes this assertion.

We reject the defendant's position and find that Lozano has standing to sue regarding both the tenant

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[6] At the time the plaintiff filed the lawsuit, the defendant challenged the standing of the two named landlord plaintiffs. One of those plaintiffs has been dropped from the suit, but the defendant's arguments nevertheless apply to the remaining landlord plaintiff.

registration and the employer portions of Hazleton's ordinances. First, Lozano has suffered an injury that is both concrete and particular and actual or imminent. Lozano rented the property immediately after signing the mortgage, and continued to do so until the City passed the ordinances.[7] (*Id.* at 165). Once the ordinances passed, Lozano had more difficulty renting the property, "and the tenants that were there ran away." (*Id.*). His tenants left after he informed them that they may have to obtain a permit from the City to rent the apartment. (*Id.* at 167). After the ordinances passed, Lozano "sporadically" rented the property, but the house was not occupied "continuously." (*Id.* at 168). He showed the apartment to at least five or six people, who seemed interested in the property but failed to complete the transaction. (*Id.*). Lozano's difficulties in renting the apartment constitute an injury.

Lozano also had hired others to do more complicated repairs on his property, such as roofing. (*Id.* at 175). He anticipated hiring a contractor to repair his

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[7] Cross-examination revealed that Lozano had not made a profit on his rental of the property in 2005, and that the apartment may not have been occupied continually during that period. (*See* N.T. 3/15/07 at 177-181). We note, however, that Lozano testified that at least part of his purpose for renting the apartment was to assist with his mortgage payments. In that sense, the purpose of the investment appears to extend beyond simply making money, and we should not evaluate standing based solely on previous profitability. Defendant has demonstrated, however, that renting the apartment may not have been as easy as Lozano claimed.

roof sometime in the future. (*Id.*). He would thus be forced, as an employer of labor, to comply with the employer requirements of the IIRA, adding a burden of time and expense to his operations. Therefore, he has suffered an actual or imminent injury sufficient to meet the constitutional standing requirements. *See Pennell v. City of San Jose*, 485 U.S. 1, 8, 108 S.Ct. 849, 99 L.Ed.2d 1 (1988) (finding that landlords who challenged zoning requirements related to hardship tenants had standing because "[t]he likelihood of enforcement, with the concomitant probability that a landlord's rent will be reduced below what he or she would otherwise be able to obtain in the absence of the ordinances, is a sufficient threat of actual injury to satisfy Art. III's requirement that 'a plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement.'") (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979)).[8]

We disagree with the defendant that these injuries cannot be recognized by the law because they constitute a complaint about an inability to rent to illegal immigrants. The plaintiffs testified that they were unaware of the immigration status of their renters. No evidence, therefore, indicates that the

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[8] We note that our database incorrectly cited *Babbitt v. Farm Workers* as 422 U.S. 289, 95 S.Ct. 2336, 45 L.Ed.2d 191. The correct citation for that case is 442 U.S. 289, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979).

renters they lost were illegal immigrants. Such tenants may have been legal residents who did not desire to live in a town that appeared (to them) to seek to exclude Spanish-speaking residents. Such tenants may also have concluded that they did not want to register with the town and provide private information to the City as a condition of residing there. Perhaps they found the fees required for a permit onerous. In any case, we will not assume that the renters plaintiff lost were necessarily illegal immigrants.

Further, Lozano's injuries are caused by the defendant's ordinances. Potential renters' concerns with the registration requirements of the ordinances and the attitude towards immigrants their passage conveyed undermined Lozano's ability to secure tenants. Lozano had informed the prospective tenants that the ordinance's registration requirements mandated that they bring immigration documents to the City, and those prospective renters never returned. (N.T. 3/12/07 at 168). In addition, complying with the ordinances requires action that will cause him time and expense and expose Lozano to potential adverse enforcement actions. If the ordinances did not exist, the landlord plaintiffs would not be required to follow these procedures. The injury Lozano claims is therefore caused by the defendant's actions. *See Lujan,* 504 U.S. at 561-62, 112 S.Ct. 2130 (holding that "[w]hen the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or

proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or foregone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will address it.").

Redressability is also apparent: if this court declares the ordinances unconstitutional and enjoins their enforcement, Lozano and the other landlord plaintiffs will not be forced to comply with them. As a result, those plaintiffs will not be required to examine and ensure the immigration status of their tenants, facing the possibility of fines and other penalties from the City for failing to do so. The burdens they face from such compliance will not exist, and their injury will be eliminated.

ii. Rosa and Luis Lechuga

Defendant also challenges the standing of the plaintiffs Rosa and Luis Lechuga, who when they filed suit were business owners in the City. Plaintiff Jose Lechuga, a resident of Hazleton, had lived in the City of Hazleton with his wife Rosa and their five children for sixteen years. (N.T. 3/12/07 at 118). When he came originally to the United States from Mexico in 1982, he did not have legal authorization to do so, but he is now a legal permanent resident of the country. (*Id.* at 118-19). He and his wife used a 1980s

federal amnesty program to adjust their immigration status. (*Id.* at 120).

Lechuga opened a store, Lechuga's Mexican Products, in 2000. (*Id.* at 128). The store sold "[t]ortillas, cheese, chorizo, canned chiles, different canned products, [and] also sodas from Mexico." (*Id.*). His family worked in the store with him, including his wife and children. (*Id.* at 129). The business was not always profitable; in 2005 the Lechugas "didn't have much of a profit, but . . . [were] still in business." (*Id.* at 130). Business improved in 2006, but began decreasing after the City passed the ordinances. (*Id.* at 131). By early 2007, business had become "terrible," and in February 2007, Lechuga closed the store. (*Id.*).

Lechuga opened another business, a restaurant called Langria Lechuga, in February 2006. (*Id.* at 132). Lechuga's wife Rosa operated that business, doing the cooking. (*Id.*). When he found the time, Lechuga helped by serving, taking orders, washing dishes and cleaning. (*Id.*). This business was no more successful than the Lechugas' store. (*Id.* at 133). Lechuga blamed his lack of business on the City's activities.[9] (*Id.*). A police car was often parked across the street from the restaurant, and after a police

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[9] Rosa Lechuga testified that the restaurant opened in February 2006, and had been profitable in its first week: "Things were going very well, and then when the ordinances were enacted, my business began to suffer." (N.T. 3/12/07 at 154-55).

officer paid a visit, "people began to comment that the police [were] there to take the clients away when they came to eat." (*Id.* at 133). This made potential customers feel "intimidated, and that is the reason why we lost our business."[10] (*Id.*). In neither of these businesses did Lechuga employ anyone; he testified that he had never had any plans to employ anyone at either store. (*Id.* at 150-51).

Plaintiffs have suffered an injury here in the loss of business they experienced after the ordinances passed. To experience an injury sufficient to create standing, a plaintiff need not allege a large quantum of harm. The Third Circuit Court of Appeals, in *Belitskus v. Pizzingrilli,* 343 F.3d 632 (3d Cir.2003), found that a plaintiff who complained that he could not afford a $100 filing fee to campaign for public office had stated an injury sufficient to confer standing. *Id.* at 640. Plaintiff had only $50 in campaign funds and "paying the required fee would have completely depleted his campaign funds and required him to delve into his limited personal assets." *Id.* (holding: "'All that the Article III's injury-in-fact element requires is 'an identifiable trifle' of harm'") (quoting *Joint Stock Soc'y v. UDV N. Am., Inc.,* 266 F.3d 164, 177 (3d Cir.2001) (citation omitted)). The injury of which plaintiffs complain, like the potential injury in *Belitskus,* is one that pushed their financial condition

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[10] On cross examination, "Lechuga attributed his loss of business to the ordinances." (N.T. 3/12/07 at 138).

from bad to worse, contributing ultimately to disaster. Such an injury surely constitutes an "identifiable trifle."

The Lechuga's injury was caused at least in part by the defendant's ordinances. While other factors apparently contributed to the decline of the Lechuga's businesses, we find that they have presented evidence that Hazleton's approval of the ordinances contributed at least in part to the decline of customers for Lechuga's store and restaurant, and therefore, the injury they suffered is at least fairly traceable to the defendant.

Our decision on the constitutionality of the ordinances would not, however, allow the Lechugas redress from their injuries. Their businesses, unfortunately, have now closed. They did not testify that they planned to reopen their businesses pending resolution of this lawsuit, and the plaintiffs do not seek monetary damages from the defendant.[11] Accordingly, no action by this court would provide relief to the Lechugas, and they lack standing to sue. The Lechuga's lack of standing, however, does not mean that other business-owner plaintiffs, who will be forced to comply with the terms of the ordinances in order to operate their business in Hazleton, lack standing to sue, as we explain below.

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[11] Indeed, the Lechugas testified that they had decided to move out of state. *See* (N.T. 3/12/07 at 136-37).

b. Organizational Plaintiffs

Defendant argues that the organizational plaintiffs – Casa Dominicana of Hazleton, Inc., the Hazleton Hispanic Business Association and the Pennsylvania Statewide Latino Coalition – all lack standing. Defendant argues that none of the individual members of these associations have standing, and that the organizations cannot claim representational standing. Defendant also contends that none of the organizational plaintiffs can allege a concrete injury to their own interests, because any membership loss experienced by the organizations since the passage of the ordinances is connected by only a speculative thread to the ordinances themselves.[12] Any claim of public hostility to the organizations generated by the ordinances is too generalized, defendant claims, to

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[12] Defendant claims that "[t]he loss of membership is not an injury to a legally cognizable interest, where maintaining desired levels of membership requires continuing membership of aliens unlawfully present in the United States." (Memorandum of Law in Support of Defendant's Motion to Dismiss (Doc. 87) at 22). Plaintiffs' claim is not that the ordinances, by attempting to exclude illegal aliens from Hazleton, have harmed the organizations' ability to recruit undocumented people to their ranks. We will not assume, as defendant appears to do, that membership in such organizations is populated in large numbers by people without legal authorization to remain in the United States. Indeed, the problem highlighted by these organizations – that the ordinances have created a climate of fear which causes people to avoid association with groups that express interest in the rights of immigrants and Latinos – is partly reflected in defendant's claims here, which seem to associate Latino political activity with illegality.

constitute an injury in fact. Defendant also contends that plaintiffs have not proved any causal connection between the ordinances and the injuries suffered by the plaintiff organizations. Finally, defendant insists that an injunction against the ordinances would not be likely to redress the injuries plaintiffs claim.

An organization seeking to participate in a lawsuit must demonstrate that it has standing to sue. While an organization can have standing in its own right, "an association may have standing solely as the representative of its members." *Warth,* 422 U.S. at 511, 95 S.Ct. 2197. Still, such standing "does not eliminate or attenuate the constitutional requirement of a case or controversy." *Id.* Courts have found that an organization can have "representational standing" when "'1) the organization's members would have standing to sue on their own, 2) the interests the organization seeks to protect are germane to its purpose, and 3) neither the claim asserted nor the relief requested requires individual participation by its members.'" *Public Interest Research Group of New Jersey v. Powell Duffryn Terminals, Inc.,* 913 F.2d 64, 70 (3d Cir.1990) (quoting *Hunt v. Washington Apple Advertising Comm'n,* 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977)).

Defendant challenges the standing of the Hazleton Hispanic Business Association ("HHBA"). Rudolfo Espinal, the president of the HHBA, testified at trial as a representative of that organization. (N.T. 3/13/07 at 77). Espinal testified that the HHBA, formed in August 2006, is "a group of Hispanic businessowners

that got together in the City of Hazleton to work towards common goals," especially to "promote the interest of our business members and to project the image of the Hispanic business community and to also help the community any way that we can." (*Id.* at 77-78). Most of the businesses in the association are located in Hazleton, though some operate in the neighboring town of West Hazleton. (*Id.* at 78). The association promoted access to health insurance and accounting services, but also aimed to protest the anti-illegal immigration ordinances that the City had proposed. (*Id.* at 79). Twenty-seven members joined the organization. (*Id.* at 80). The passage of the ordinances harmed organization members; some lost their businesses or a significant portion of their patrons, and many members abandoned plans to expand their businesses.[13] (*Id.* at 81). The organization also lost members, as "some of [them] didn't want to be part of the organization anymore." (*Id.* at 83). The HHBA lost resources, as members were required to pay $75 in dues and fewer dues-paying members remained. (*Id.* at 84).

Espinal himself lost business as a result of the ordinances. Espinal owned three rental properties in

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[13] Espinal testified that "Royal Prestige had to close and move out of the City. Isabella's Gift Shop had complained about losing revenue, and basically I would say all of my members have complained. People are talking about that they have lost sales maybe between 15 or 50 percent of what they used to have before." (N.T. 3/13/07 at 82).

the City of Hazleton. (*Id.* at 90). At the time of trial, two of those units were undergoing repairs, and one was occupied. (*Id.*) That building consisted of four apartment units. (*Id.*). Espinal lived in one of those units and rented out two others. (*Id.*). The fourth sat vacant. (*Id.*). Espinal testified that after the City passed its ordinances "it is harder to rent apartments now, and besides that, I think that I lost tenants, potential tenants because of the ordinance." (*Id.* at 92-93). After showing the apartment to prospective tenants and discussing rental prices, those tenants had indicated a desire to rent the unit. (*Id.* at 93). Following a discussion with these prospective tenants of the registration requirements under the ordinances, however, Espinal "didn't hear from them." (*Id.*). A similar process repeated itself with several other prospective renters. (*Id.* at 95). Espinal planned to offer his other properties for rent, but needed to perform repairs such as painting, carpeting and electrical work before doing so. (*Id.* at 96). Espinal intended to perform some of that work himself, but would also hire workers to perform "whatever area I don't feel comfortable with." (*Id.* at 96). As president of the HHBA, Espinal knew of other organization members who were landlords in Hazleton. (*Id.* at 98). These members had the same concerns for the effect of the ordinances on leasing their apartments. (*Id.*). Espinal also testified that he understood the ordinances to require that he obtain information on

immigration status from tenants that he normally would not seek.[14] He had no "training in evaluating a person's immigration status or their documents." (*Id.* at 102).

The HHBA has representational standing in this case. Individual business owners who are members of the HHBA have standing to sue. Espinal, like Lozano, would have standing to sue as a landlord and as an employer. Espinal also testified that members of the HHBA would be required to comply with the procedures required for employers under the IIRA. They would then face onerous paperwork requirements created by the ordinances for maintaining their licenses. These injuries would be caused by the ordinances and could be redressed by enjoining their enforcement. Since the HHBA is designed to protect the interests of Hispanic business owners in the city and the lawsuit attacks city-created regulations of business, the organization is seeking to protect interests germane to its purpose. Finally, the claim asserted here by the organization attacks the ordinances on their face; such an attack does not require the factual specificity or individual experience required of a lawsuit over a specific event. Accordingly, the participation of individual members is not

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[14] Espinal testified that "when you rent an apartment, you ask people about their ability to pay the rent, if they are working or not, that kind of stuff. I don't think you should ask about their family composition or their religion or anything like that or their immigration status." (N.T. 3/13/07 at 99).

required for the court to address adequately the issues raised by the lawsuit.

Defendant argues that the business-owner plaintiffs do not face an "actual or imminent risk" that the city will enforce the IIRA ordinance against them because these plaintiffs do not know if they have any illegal alien employees and cannot say they definitely will hire such employees in the future. In any case, defendant insists, plaintiffs have no legal right to employ illegal aliens and cannot have an injury from an ordinance that prevents such action. Because the law operates only prospectively, plaintiffs can suffer an injury from the ordinance only if they hire an unauthorized worker according to the defendant. Since no plaintiff has declared an intention to hire an undocumented alien, defendant contends, the plaintiffs have no injury. Plaintiffs who claim to have suffered a loss of business commerce as a result of the ordinances also cannot demonstrate an injury, defendant insists, since "[n]o-one has a legally cognizable interest in profiting from the continuing sales of products to aliens unlawfully present in the United States." (Memorandum of law in Support of Defendant's Motion to Dismiss (Doc. 87) at 18). Defendant further contends that the plaintiffs cannot prove that the alleged injuries to their businesses were caused by the ordinances and cannot meet the causation requirement for standing.

We reject this argument. The business-owner plaintiffs do not complain that the ordinances limit their ability to sell products to and hire illegal aliens.

They complain that the City's ordinances damage them by hindering the operation of their businesses and by requiring them to seek immigration information from employees in a way that violates federal law. Their injury comes in the operation and requirements of the ordinances, not in their inability to sell, hire or rent to undocumented persons.

Defendant also challenges the standing to sue of Casa Dominicana de Hazleton ("Casa"). At trial Manuel Saldana, President of the organization, testified as a representative of the organization. (*See* N.T. 3/14/07 at 7). Casa is a not-for-profit corporation founded in August 2005.(*Id.*). The organization's offices are located in Hazleton. (*Id.* at 10). Around fifty Casa members live in Hazleton. (*Id.* at 12). Twenty to twenty-three members may lack legal authorization to reside in the United States.[15] (*Id.* at 21). Casa's purpose is "[t]o offer assistance, orientation, education, keep the unity within the community and unify the ties between the Hazleton community and the Latin community." (*Id.* at 7). Members of the organization included "[i]ndividuals, people renting, employees, different businesses, owners of businesses, drivers, chauffeurs," "a cross-section of

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[15] Saldana clarified this figure on re-direct: "I say 23 members, approximately . . . I would have to go over each individual's case to see what their actual [immigration] status is, because many individuals have expired or lost documents or are in the process of obtaining documents. Those are the individuals that I refer to as illegals." (N.T. at 3/14/07 at 29).

the Hazleton community[.]" (*Id.* at 9-10). To its members, the organization provides services to help with orientation and education. (*Id.* at 8). Casa also sponsors concerts and raises money to assist members through periods of financial difficulty. (*Id.*). The organization also assists members with problems in their immigration status by directing them to attorneys and providing assistance through "orientation." (*Id.* at 8-9).

Casa members petitioned the organization to participate in the instant lawsuit. (*Id.* at 11). They feared the impact of the ordinances. (*Id.* at 14). Members, both legal and illegal residents, expressed "fear of not being able to obtain housing at a moment when it was needed" as well as concerns about having to produce identification at work and the effect of the ordinances on their children at school.[16] (*Id.*). The organization lost thirty-five members in August 2006, after the City passed its ordinances. (*Id.* at 17). One member who left the organization decided to leave Hazleton because "he found that the measures that

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[16] Saldana testified that "[t]he concern was not only from the illegal residents, but also from the legal residents. An individual that has a document or visa that is expired, according to law, it is no longer valid. However, the individual is legally registered within the country, and the problem of receiving a valid document once again takes at least a month's time, the same way as if you lose a document, and that is the case with some individuals who enter the country legally, and they are going through the process of legalizing themselves. They have a work permit, however, they don't have residency." (N.T. 3/14/07 at 15).

were about to be approved were hateful and uncomfortable for him." (*Id.* at 18). This loss of membership, Saldana testified, harmed the organization because it diminished the number of volunteers available to carry out the group's activities and limited the number of services Casa could offer members. (*Id.* at 18-19).

Casa has representational standing. Members of the organization are both tenants and employees in Hazleton, and would be required to comply with the terms of the ordinances. They would have to participate in the rental registration program or lose their housing in the city. They would have to supply their employers with immigration information or face losing their jobs. Those injuries for individual members would be fairly traceable to the ordinances, which institute the registration and employment regulations. If we were to enjoin enforcement of the ordinances as the plaintiffs here seek, we could redress the Casa's injuries in this case. Casa's purpose, to promote the interests of Dominicans in their relationships in the Hazleton community, would be served by this litigation. Finally, since this case consists of a facial challenge to the City's ordinances, the interests of the litigation can be advanced without requiring the participation of individual plaintiffs. Casa has representational standing for its members.

The defendant likewise challenges the standing to sue of plaintiff Pennsylvania Statewide Latino Coalition ("PSLC"). Jose Molina testified as representative of the PSLC during the trial in this case.

PSLC "is a nonprofit organization that promotes social, financial, political and cultural development of the Latino community in the State of Pennsylvania." (N.T. 3/13/07 at 20). The organization's goal "is to have a network of Latinos" addressing the interests of Latino communities statewide. (*Id.* at 21). The organization was founded by volunteers from across the state. (*Id.*). Of the 6,000 statewide PSLC members approximately twenty reside in Hazleton. (*Id.* at 52). Among the activities the PSLC has engaged in are lawsuits protesting discriminatory hiring practices for police officers and teachers, the promotion of professional certification for nurses and teachers from Puerto Rico, and promotion of voter registration and voters' rights. (*Id.* at 23). The organization also promotes education for Latinos in the state. (*Id.* at 24). Before engaging in activities like litigation, PSLC representatives "sit down with residents and people that are affected." (*Id.*). Such conversations are often initiated by these people, who reach out to the PSLC for help. (*Id.*).

The PSLC became involved in the Hazleton litigation partly as a result of requests from Hazleton community activists. (*Id.* at 25). On July 30, 2006, the PSLC organized a meeting in Hazleton to discuss the ordinances. (*Id.* at 26). Between fifty and sixty people, including "homeowners . . . business owners . . . [and] landlords," attended this meeting. (*Id.* at 27). The fears that attendees at this meeting expressed to Molina convinced him that the issues raised by the ordinances would affect people far beyond Hazleton's

borders.[17] (*Id.* at 28-29). Members of the organization who expressed these concerns included several who lived in Hazleton and who "decided to join and become members right away in the thinking that this is something that may help us, because we want to stay in this community." (*Id.* at 30).[18] Among these members were Anna Arias, who rented out half of her home and "the Rubio family," who owned a gift shop. (*Id.* at 65-66). Another member owned a barber shop, and Molina pointed to "a few more" members who were business owners. (*Id.* at 66).

The PSLC has representational standing. Members of the organization include residents of Hazleton who face actual or imminent injury from the ordinances because they are landlords or business owners who will be required to comply with the ordinances' terms. They will have to register if they intend to rent apartments, providing personal and potentially

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[17] Molina described the feelings of residents: "They had people that were in fear because the police were stopping them on the sidewalks or stopping them on the driveway and asking for documentation just because of their looks. We have business-owners saying, we have bricks through our [windows], and we can't identify who [threw the brick], but obviously it was because of the environment where we are living, where people think that it is okay to show that Latinos are not welcome here. There was all kind of fear, and what is going to happen with our sons. Should we still send them to school? What is going to happen to our church? Should we still go to our church?" (N.T. 3/13/07 at 28).

[18] Jose Lechuga is a member of the PSLC. (N.T. 3/12/07 at 120-21).

confidential information to the City. If they are employees, they will also have to provide information about their immigration status. Similarly, members who are employers will be burdened with IIRA's requirements and face liability if challenged on their employment practices. Accordingly, these plaintiffs have or will suffer an imminent injury from the ordinances. These injuries, since they are or would be caused by the operation of the ordinances, are fairly traceable to the defendant's actions.

Finally, an injunction would prevent the plaintiffs from being required to comply with the terms of the ordinances, and would thus provide redress. Participation in the litigation would serve the purposes of the PSLC, since the social and financial interests of Latinos in Hazleton are threatened by the terms of the ordinances and the PSLC's involvement in the litigation seeks to protect those interests. In addition, since this is a challenge to ordinances that involves constitutional concerns rather than litigation about a particular event or interest, the individual participation of the represented members is not required to insure that their interests are protected.

c. Tenant Plaintiffs

Defendant argues that the plaintiffs who are tenants in Hazleton, all of whom attempt to proceed anonymously, lack standing to sue. These plaintiffs, defendant contends, ground their claim in a belief that they may not obtain occupancy permits from the

City and will, therefore, be required to leave Hazleton. Defendant insists that this injury is not one which the court can address. Those plaintiffs who are not lawfully present in the United States do not have a legal interest in residing in Hazleton or anywhere in the United States and cannot claim an injury from ordinances that seek to prevent their residence in the City. Defendant also argues that those tenant plaintiffs who are lawfully present in the United States cannot show that they will likely suffer any injury-in-fact. IIRA, after all, will not cause them to be removed from the City or be denied an occupancy permit. If a tenant can show proof of legal residency or citizenship, that tenant must receive a rental permit and will suffer no injury from the ordinance. Even if a resident filed a complaint against a legal resident, such a plaintiff would not be injured: "an alien lawfully present in the United States can have no reasonable expectation that the federal government would regard him as unlawfully present." (Memorandum of Law in Support of Defendant's Motion to Dismiss (Doc. 87) at 20).

Plaintiff John Doe 1 testified by deposition on December 8, 2006. (*See* Doc. 189, Dep. John Doe 1). He has lived in Hazleton for six years, but was born in Mexico. (*Id.* at 12). John Doe 1 is not a United States citizen or legal permanent resident, though his father filed a document with the federal government seeking to change his immigration status. (*Id.* at 16, 19). He testified that he was unsure of his immigration status, though he thought that the federal

government could order him removed from the country. (*Id.* at 22). John Doe 1 was also unsure whether he had legal authorization to work. (*Id.*). When he began working for his present employer, John Doe 1 presented identification that included an international driver's license and a Social Security card. (*Id* at 27). John Doe 1 was forced to vacate one apartment after a landlord told him he would "have to move" after passage of the Hazleton ordinances. (*Id.* at 43). Though John Doe 1 thought he may be able to get a residency permit, his landlord told him "maybe, but he didn't want to take the risk" of having to pay a fine. (*Id.* at 44). John Doe 1 felt that his landlord wished he could stay in the apartment "because I'm a good tenant and we're family, but when he saw the ordinance, he was afraid." (*Id.* at 53).

John Doe 3 likewise testified by deposition on December 8, 2006. (See Doc. 190, Dep. John Doe 3). He was born in Mexico and is a citizen of that country. (*Id.* at 17). He is a tenant in Hazleton, where he lives with his wife and two daughters. (*Id.* at 12-13). Joe Doe 3 is not a lawful permanent resident of the United States. (*Id.* at 24). He understands his immigration status to be "illegal." (*Id.* at 26). If this court were to allow the Hazleton ordinances to go into effect, John Doe 3 fears that he will be evicted from his residence. (*Id.* at 31).

Jane Doe 5 testified by deposition on January 26, 2007. (*See* Doc. 191, Dep. Jane Doe 5). Jane Doe 5 rented an apartment in Hazleton, the city where she

had lived for the past five years. (*Id.* at 12-13). She was born in Columbia, and is not a United States citizen or lawful permanent resident. (*Id.* at 14-15, 56). She fears apprehension and removal by United States authorities if the City enforces its ordinances. (*Id.* at 56). Jane Doe 5 does not want to lose her residence, and for that reason hopes the ordinance will not be enforced. (*Id.* at 61-62). She did not want to speak to her landlord about the registration ordinance because she feared that the landlord would feel he had to ask her family to vacate their home. (*Id.* at 74). If the ordinances were enforced, Jane Doe 5 fears that she would have trouble finding a place to live in the City. (*Id.* at 81).

John Doe 7 testified by deposition on January 26, 2007. (*See* Doc. 191, Dep. John Doe 7). Like his wife, Jane Doe 5, John Doe 7 was born in Columbia. (*Id.* at 9). He is not a United States citizen or lawful permanent resident. (*Id.* at 10). Trained as an architect, Doe 7 came to the United States in 2001.(*Id.*). For the previous seven or eight months, Doe had worked as a gardener. (*Id.* at 12). He and his wife lived in a rented home in Hazleton. (*Id.* at 14-15). John Doe 7 testified that he had not spoken frequently with his landlord out of fear that "because of the ordinances, he's going to ask them to leave the house, evict them from the house." (*Id.* at 58). That would require him "to find another house and it's going to be so difficult" to do so. (*Id.*). He fears he would be forced to leave Hazleton. (*Id.*).

These plaintiffs claim that the rental registration requirements and harboring provisions of IIRA violate their rights under federal law and the United States Constitution, including their right to privacy. We find that the anonymous plaintiffs have standing to challenge Hazleton's ordinances. They have suffered concrete and particularized injuries which are actual or imminent. These plaintiffs have either been forced from the property which they had rented or had been told by their landlords that they would have to be evicted due to the ordinances. The loss (or imminent loss) of one's apartment and the inability to rent a new one is certainly an actual and concrete injury. *See Babbitt v. United Farm Workers*, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979) (holding that "[a] plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement [citation omitted] [b]ut [one] does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough."). Similarly, plaintiffs would suffer an injury to their privacy rights if forced to turn over private information in order to gain a rental permit. Such an injury is imminent, as plaintiffs intend to remain in Hazleton and would be required to obey the ordinance if it is enforced.

The tenant plaintiffs also meet the causation requirements of constitutional standing. But for IIRA's requirements that plaintiffs obtain a rental permit by presenting documentation that proves their legal

immigration status, plaintiffs would not face the loss of their apartments or the exposure of potentially private information. Plaintiffs face eviction by their landlords only because of IIRA's harboring provisions.

Plaintiffs' injuries would also be redressed by a favorable decision in this case. If plaintiffs prevail here, this court will issue a permanent injunction against the enforcement of the ordinances that has caused their injuries. The tenant plaintiffs thus have constitutional standing to proceed in this case.

We reject defendant's argument that these plaintiffs lack standing because they do not have authorization to reside in the United States and have not suffered an injury for which they could gain relief. First, the defendant appears to argue that because plaintiffs would be denied residency permits under the Hazleton ordinance they lack authorization to reside anywhere in the United States. No court has made such a determination for any of these plaintiffs. No evidence has been presented that removal orders exist for any of the anonymous tenant plaintiffs. None has ever been arrested, and none testified they were being sought by immigration authorities. In other words, as of the time of their depositions, none of these plaintiffs would have been forced by any determination of the federal government to leave the City. To find otherwise at this point would be to ignore every principle of due process. The tautology of this argument is likewise apparent: defendant contends that plaintiff would not be able to obtain a residency

permit in the city and therefore cannot complain about being required to do so.

This argument appears to be a species of argument often heard in recent discussions of the national immigration issue: because illegal aliens broke the law to enter this country, they should not have any legal recourse when rights due them under the federal constitution or federal law are violated. We cannot say clearly enough that persons who enter this country without legal authorization are not stripped immediately of all their rights because of this single illegal act.[19] The Fourteenth Amendment to the

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[19] Fundamental to the American legal tradition is the notion that those accused of and convicted of crimes possess fundamental rights which are not abrogated simply because of such person's alleged behavior. A person accused of a crime is entitled, among other rights, to be free of unreasonable search and seizure; to the presumption of innocence; to the proof of her guilt beyond a reasonable doubt; to minimally competent legal representation; to access to any potentially exculpatory evidence; to be free of cruel and unusual punishment; and to seek a writ of habeas corpus. *See, e.g.,* U.S. CONST. amends. IV, V, VIII; *Brady v. Maryland,* 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) (holding that "the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."). *Strickland v. Washington,* 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (holding that "[a]n accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair."). We note, however, that an alien subjected to a deportation hearing "whether for crime or for other reasons, [is] protected only by the procedural requirements of the Due Process Clause." DANIEL

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United States Constitution provides that no State may "deprive any *person* of life, liberty or property, without due process of law; nor deny any *person* within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV § 1. (emphasis added). The United States Supreme Court has consistently interpreted this provision to apply to all people present in the United States, whether they were born here, immigrated here through legal means, or violated federal law to enter the country. *See Plyler,* 457 U.S. at 210, 102 S.Ct. 2382 (holding that "[w]hatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments."). The anonymous plaintiffs are persons, and they seek to vindicate rights guaranteed them under the federal constitution. They have standing to sue in this court.

KANSTROOM, *United States Immigration Policy at the Millenium: Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases,* 113 HARV. L.REV. . 1889, 1896 (2000). The contemporary concern with and opprobrium towards undocumented aliens does not lead us to the conclusion that those who violate the laws to enter the United States can be subject without protest to any procedure or legislation, no matter how violative of the rights to which those persons would normally be entitled as persons in the United States. Our legal system is designed to provide rights and exact justice simultaneously.

2. Prudential Standing

Having found that all plaintiffs possess constitutional standing, we now address defendant's argument that plaintiffs lack prudential standing.

Even if a court finds that plaintiffs meet the "threshold" requirements of constitutional standing, that court may nevertheless "impose" "a variety of prudential limits" on standing. 13 Charles A. Wright, Arthur R. Miller and Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE at § 3531. Courts have concluded that "the aim of this form of judicial self-governance is to determine whether the plaintiff is 'a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers.'" *Mariana v. Fisher,* 338 F.3d 189, 204 (3d Cir.2003) (quoting *Oxford Assocs. v. Waste Sys. Auth. of E. Montgomery County,* 271 F.3d 140, 145 (3d Cir.2001)). Courts invoking prudential standing analysis seek "'to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim.'" *Davis v. Philadelphia Housing Auth.*, 121 F.3d 92, 96 (3d Cir.1997) (quoting *Wheeler v. Travelers Ins. Co.*, 22 F.3d 534, 538 (3d Cir.1994)). The Third Circuit Court of Appeals has articulated a three-part test for prudential standing: 1) "a litigant [must] assert his or her own legal interests rather than those of a third party"; 2) "courts [should] refrain from adjudicating abstract questions of wide public significance amounting to generalized grievances"; and 3) "a

plaintiff must demonstrate that his or her interests are arguably within the 'zone of interests' that are intended to be protected by the statute, rule, or constitutional provision on which the claim is based." *Mariana*, 338 F.3d at 205; *see also Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004) (holding that "we have explained that prudential standing encompasses 'the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.'") (quoting *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984)).

Defendant argues that none of the plaintiffs meet the requirements of prudential standing because they do not fall within the "zone of interests" of the Immigration and Nationality Act.[20] We note, first, that defendant faces a difficult burden to establish that

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[20] We note that the defendant does not address the two other elements required for prudential standing: 1) "a litigant [must] assert his or her own legal interests rather than those of a third party"; 2) "courts [should] refrain from adjudicating abstract questions of wide public significance amounting to generalized grievances." *Mariana*, 338 F.3d at 205. We would in any case find that plaintiffs meet these requirements, since they assert their own interests or the interests of the members of their organizations and because the grievances are specific to the ordinances and their intended application in Hazleton.

these plaintiffs lack prudential standing, as they do not seek to assert the rights of others or to challenge the way that an agency has applied a particular law, but instead seek to challenge ordinances which they claim would violate their rights under federal and state law.[21] The United States Supreme Court has declared that "[w]here a party champions his own rights, and where the injury alleged is a concrete and particularized one which will be prevented or redressed by the relief requested, the basic practical and prudential concerns underlying the standing doctrine are generally satisfied when the constitutional requisites are met." *Duke Power Co. v. Carolina Envtl. Study Group,* 438 U.S. 59, 80-81, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978).[22]

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[21] The requirements of prudential standing and the zone of interests test in the Third Circuit also mean that plaintiffs' task here is not particularly onerous. Courts use prudential standing "to ensure that only those parties who can best pursue a particular claim will gain access to the courts." *Oxford Associates v. Waste Sys. Auth. Of E. Montgomery County,* 271 F.3d 140, 145 (3d Cir.2001). In terms of the "zone of interests" test, the Third Circuit Court of Appeals has concluded that the test was "'not meant to be especially demanding.'" *Id.* at 146 (quoting *Davis v. Philadelphia Housing Authority,* 121 F.3d 92, 101 (3d Cir.1997)).

[22] A recent Supreme Court case that determined a plaintiff lacked prudential standing, *Elk Grove Unified Sch. Dist. v. Newdow,* 542 U.S. 1, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004), turned on the fact that the respondent, who sued the school district and argued that a requirement that students use the phrase "under God" when reciting the Pledge of Allegiance violated the establishment clause of the First Amendment, had brought the case on behalf of a daughter who did not necessarily

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Defendant insists that plaintiffs fall outside of the zone of interests protected by the statutes and constitutional provisions invoked in this lawsuit because the Immigration and Nationality Act ("INA") was not designed to protect "employers who unlawfully employee [sic] illegal aliens and landlords who harbor illegal aliens." (Memorandum of Law in Support of Defendant's Motion to Dismiss (Doc. 87) at 9). Accordingly, "those who break federal immigration law by employing or harboring illegal aliens have no standing to raise a challenge that is based on federal immigration law." (*Id.*). Similarly, illegal aliens, the defendant contends, do not fall within the zone of interests of the INA and lack standing to raise a preemption claim under that statute; an illegal alien, defendant insists, "does not have standing to invoke the protection of the INA in attempting to displace a state or local ordinance."[23] (*Id.* at 9).

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feel injured by the language to which her father objected. In addition, the girl's mother – the ex-wife of the respondent – objected to the claim. *Id.* at 17, 124 S.Ct. 2301 (holding that "it is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff's claimed standing.").

[23] Implied in this argument is again the claim that people who break the laws to enter, work or reside in this country should not have access to the courts because they are "criminals" undeserving of the rights those courts seek to protect. "Illegal means illegal," after all. Such argument, however, flies in the face of long-established principles of constitutional law, not to

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The prudential standing doctrine indeed requires that "a plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit." *Bennett v. Spear,* 520 U.S. 154, 163, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997); *see also Storino v. Borough of Point Pleasant Beach,* 322 F.3d 293, 300 (3d Cir.2003). In this suit, plaintiffs invoke several different statutory and constitutional provisions in their numerous claims seeking to prevent enforcement of Hazleton's ordinances. Plaintiffs, for instance, charge that the ordinances violate their constitutional privacy rights and the equal protection and due process guaranteed them under the Fourteenth Amendment. They also allege that the ordinances violate rights granted them by federal Fair

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mention the concept of justice. All persons in the United States have rights under the Fourteenth Amendment to the United States Constitution, whether they are citizens or not. *See Plyler,* 457 U.S. at 210, 102 S.Ct. 2382 (holding that "[w]hatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments."); *Yick Wo v. Hopkins,* 118 U.S. 356, 369, 6 S.Ct. 1064, 30 L.Ed. 220 (1886) (holding that "[t]he Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.").

Housing Act, 42 U.S. § 1981, and Pennsylvania statutory and common law. Finally, plaintiffs claim that the regulatory scheme set out under federal immigration law pre-empts Hazleton's efforts to control the presence of illegal immigrants in the City and the ordinances violate the Supremacy Clause of the United States Constitution.

Our question, therefore, is whether these grievances fall within the zone of interests protected by the various constitutional and statutory provisions invoked by the plaintiffs in raising them. This case is different from most of the federal cases that invoke the zone of interests test, since the plaintiffs do not seek to challenge any application of a particular federal law.[24] *See, e.g., National Credit Union Administration v. First National Bank & Trust Co.*, 522 U.S. 479, 118 S.Ct. 927, 140 L.Ed.2d 1 (1998) (finding that private banks and the American Bankers Association were within the zone of interests of the Federal Credit Union Act and had standing to challenge a federal agency's interpretation of that act's membership restrictions); *Assoc. of Data Processing Service Orgs. v. Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d

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[24] Indeed, it appears that the "zone of interests" test should not be an issue in this case at all, since the plaintiffs here do not challenge the application of a particular provision of federal or state law, but are instead seeking to vindicate their rights against enactment of ordinances to which they are clearly subject. Litigating the "zone of interests" test in a case where the plaintiffs bring suit against ordinances aimed at them and their interests appears exceedingly pointless.

184 (1970) (finding that data processing companies were within the zone of interests of federal banking law and had standing to challenge the Comptroller of the Currency's ruling that national banks could make data processing services available to other banks and bank customers); *Arnold Tours, Inc. v. Camp,* 400 U.S. 45, 91 S.Ct. 158, 27 L.Ed.2d 179 (1970) (finding that travel agents had standing to challenge Comptroller of the Currency's ruling that banks could offer travel services). While the courts have not foreclosed application of the zone of interests test to cases that do not involve a federal agency action, such cases nevertheless involve some sort of agency action against which the plaintiffs protest. *See* 2 Am Jur 2d Administrative Law § 430 (arguing that "[t]he zone-of-interests test is relevant only where the action under attack is that of a government agency.").

Here, the action against which the plaintiffs protest is a local legislative enactment which they contend violates rights guaranteed them in a variety of ways under state and federal law. Plaintiffs do not claim that the application or interpretation of a law by some state or local agency to which they have no connection is inappropriate but instead claim that their legal rights are violated by a legislative enactment aimed directly at the operation of their businesses or their ability to work or rent property in the City of Hazleton.[25] Accordingly, plaintiffs arguably fall

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[25] In any case, federal courts have found that a challenge to a state law that argues for pre-emption based on a contrary

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within the zone of interests of the statutes at the center of this lawsuit, and they have prudential standing to sue.

Defendant's use of *INS v. Legalization Assistance Project of the L.A. County Fed'n of Labor,* 510 U.S. 1301, 114 S.Ct. 422, 126 L.Ed.2d 410 (1993), to argue that plaintiffs do not fall within the zone of interests

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provision of federal law does not implicate the "zone of interests" test because the lawsuit does not seek to vindicate rights secured under a particular statute, but implicates the principles protected by the Supremacy Clause of the Constitution. See *Pharma. Research & Manufs. of America v. Concannon,* 249 F.3d 66 (1st Cir.2001) (holding that "[plaintiff] has not asserted an action to enforce rights under the Medicaid statute, however, but rather a preemption-based challenge under the Supremacy Clause. In this type of action, it is the interests protected by the Supremacy Clause, not by the preempting statute, that are at issue."); *St. Thomas-St. John Hotel & Tourism Ass'n v. Virgin Islands,* 218 F.3d 232, 241 (3d Cir.2000) (holding that "[w]e know of no governing authority to the effect that the federal statutory provision which allegedly preempts enforcement of local legislation by conflict must confer a right on the party that argues in favor of preemption. On the contrary, a state or territorial law can be unenforceable as preempted by federal law even when the federal law secures no individual substantive rights for the party arguing preemption."); *Burgio and Campofelice, Inc. v. NYS Dep't of Labor,* 107 F.3d 1000, 1006 (2d Cir.1997) (holding that "'the Supremacy Clause creates an implied right of action for injunctive relief against state officers who are threatening to violate the federal Constitution or laws.'") (quoting 13B Charles A. Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2D § 3566 (1984)). These cases indicate that plaintiffs' supremacy clause challenge to local law solves any problem the plaintiffs may have with the zone of interests for their supremacy claim.

here is misplaced. In that case, Justice Sandra Day O'Connor, sitting as a Circuit Justice,[26] considered the then Immigration and Naturalization Service's ("INS") request for a stay pending appeal of a district court's order. *Id.* At issue in the litigation were the procedures that the INS used to determine whether immigrants in the country without legal authorization were eligible for an amnesty offered in the 1986 Immigration Reform and Control Act ("IRCA"). *Id.*; *see* 8 U.S.C. § 1255a. The respondents were "organizations that provide legal help to immigrants" who believed that the INS had interpreted IRCA too narrowly. *Id.* Justice O'Connor noted that these respondents sought court review of the actions of a

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[26] Justice O'Connor described her role in that setting: "As a Circuit Justice dealing with an application like this, I must try to predict whether four [Supreme Court] Justices would vote to grant certiorari should the Court of Appeals affirm the District Court order without modification; try to predict whether the Court would then set the order aside; and balance the so-called 'stay equities.' [citation omitted]. This is always a difficult and speculative inquiry, but in this case it leads me to conclude that a stay is warranted." *Legalization Assistance Project*, 510 U.S. at 1301, 114 S.Ct. 422. Because of the nature of this decision – a speculative opinion by one Supreme Court Justice sitting as a Circuit Court Justice – and the fact the decision served only to delay implementation of an order pending appeal, we do not consider that opinion as binding, but rather as persuasive authority. We find defendant's assessment that "[t]he Supreme Court has stated [that none of the plaintiffs are within the INA's zone of interest] with respect to the landlords and employers of illegal aliens" to overstate both Justice O'Connor's findings and the role that her colleagues played in that decision. (Doc. 87 at 8).

federal agency, and that Congress "ha[d] explicitly limited such review to claims brought by 'person[s] suffering legal wrong[s] because of agency action' (not applicable to the respondent organizations involved here) or by persons adversely affected or aggrieved by agency action within the meaning of a relevant statute." *Id.* (citing 5 U.S.C. § 702). Justice O'Connor found that "only in cases brought by a person whose putative injuries are 'within the "zone of interests" sought to be protected by the statutory provision whose violation forms the legal basis for his complaint'" did a plaintiff have standing to sue over an agency decision. *Id.* (quoting *Lujan v. National Wildlife Federation,* 497 U.S. 871, 883, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990)). The organizations, Justice O'Connor found, did not fall within the zone of interests protected by the statute because "IRCA was clearly meant to protect the interests of undocumented aliens, not the interest of organizations such as respondents." *Id.* Though IRCA had assigned such organizations a role in the process of determining amnesty eligibility, "there is no indication that IRCA was in any way addressed to their interests." *Id.* Accordingly, Justice O'Connor found that those organizations did not fall within the zone of interests of IRCA.

Whatever precedential value we should assign to the stay of a district court order issued by a single Supreme Court Justice sitting as a Circuit Judge, we are not persuaded that this case leads to the conclusion that plaintiffs lack prudential standing under

the zone of interests test. The decision addressed the standing of advocacy groups seeking to challenge the operation of the amnesty program established under IRCA, not the standing of employers or landlords seeking to determine whether the federal scheme of regulating immigration preempted a local ordinance. Like most zone of interest cases, the court in this case was required to consider whether a plaintiff had standing to challenge an interpretation of a federal statute that did not directly regulate that group. Defendant's reading of the decision to state a general proposition that plaintiffs lack standing in cases involving preemption under the INA, therefore, is far too broad. Indeed, Justice O'Connor concluded that illegal immigrants seeking to adjust their status *were* within the IRCA's zone of interests. Plaintiff organizations in *INS v. Legal Assistance Project* had sued the federal government. Here, by contrast, plaintiffs challenge local ordinances that would directly regulate their activities as employers, employees, landlords and tenants. Justice O'Connor's opinion is not applicable to the situation here, and does not alter our determination that plaintiffs have prudential as well as constitutional standing.

Accordingly, we find that all of the plaintiffs in this case except Jose and Rosa Lechuga have both constitutional and prudential standing, and we will deny defendant's motion to dismiss on that point. The landlord plaintiffs have standing to challenge the provisions of the ordinances related to housing, as well as the employment restrictions. The tenant

plaintiffs also have standing to sue over the registration provisions of the housing ordinance, as well as for alleged violation of their privacy rights. They also have standing to challenge the employment provisions of IIRA. In short, plaintiffs have proved standing sufficiently for all of their claims to proceed.

B. Anonymous/Doe Plaintiffs

The defendant argues that the Doe Plaintiffs may not proceed anonymously. Federal Rule of Civil Procedure 10(a), defendant contends, requires that each complaint set forth the names of all the parties. Federal Rule of Civil Procedure 17(a) mandates that every action be prosecuted in the name of the real party in interest. These pleading requirements, defendant insists, are not satisfied by the "anonymous or generic" description provided for the anonymous parties in plaintiffs' amended complaint. (Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment (Doc. 150) at 105). Additionally, defendant insists that plaintiffs did not seek leave from the court to proceed anonymously, as required by the federal rules. Defendant also argues that the disclosure of immigration status is not a matter so highly personal and sensitive that anonymity is required to protect a plaintiff's interest. Finally, defendant insists that "a court of the United States cannot recognize and affirm any Plaintiff's interest in evading the laws of the United States, particularly

when such laws are not challenged in the case before the court." (*Id.* at 107).[27] We find no merit to the

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[27] We do not find that Rule 17(a) applies to our decision of whether to allow plaintiffs to proceed using pseudonyms. The requirement that an action be "prosecuted in the name of the real party in interest" relates to attempts to ensure that those who have an interest in a legal action are actually represented in the case. This rule enshrines the principle that "the action must be brought by the person who, according to the governing substantive law, is entitled to enforce the right." 6A Wright and Miller, FEDERAL PRACTICE AND PROCEDURE § 1543; *see Schupack v. Covelli*, 512 F.Supp. 1310, 1313 (W.D.Pa.1981) (finding that plaintiff was the "real party of interest" in the case because she "possessed legal title to the stock in question; . . . retained and paid plaintiff's counsel in this action; and . . . plaintiff's counsel takes his instructions solely from" her). Here, the anonymous plaintiff's claim that they live and work in Hazleton and will be harmed by the implementation of the ordinances in question. There is no doubt that they have participated in the lawsuit and that the attorneys in their case work at least in part for them. They claim the ordinance violates their rights under the United States constitution and laws of the United States and the Commonwealth of Pennsylvania. They are certainly entitled to seek enforcement of those rights and clearly are the real parties of interest in the case. The one case to which defendant cites that connects anonymity of a plaintiff to Rule 17(a) addresses a plaintiff who used an alias in pursuing a lawsuit against prison officials, and who did not seek to proceed under a pseudonym because of concerns about the consequences of using his own name but had instead used an alias at the time of his arrest to avoid deportation for a previous criminal conviction. *See Marcano v. Lombardi*, No. Civ. 02-2666, 2005 WL 3500063, *4 (D.N.J. Dec. 20, 2005) (finding that "because Plaintiff never petitioned the Court to proceed under an alias, his persistence in maintaining his false identity mandates dismissal of his case"). The facts are clearly different here. The plaintiff in *Marcano* used an alias, not a pseudonym, and did so only in attempt to prevent authorities from discovering his true

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defendant's arguments, but we shall address them all.

As set forth above, all of the John and Jane Doe plaintiffs have an uncertain immigration status. The Federal Rules of Civil Procedure demand that litigants provide "the names of all the parties." FED.R.CIV.P. 10(a). The public nature of lawsuits and the public interest inherent in the rights vindicated in courtrooms makes open and transparent proceedings imperative to equitable outcomes. *See M.M. v. Zavaras*, 139 F.3d 798, 803 (10th Cir.1998) (holding that "[l]awsuits are public events. A plaintiff should be permitted to proceed anonymously only in those exceptional cases involving matters of a highly sensitive and personal nature, real danger of physical

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identity and deporting him because of a prior criminal conviction. He did not acknowledge that he was using a false name. In addition, his case had nothing to do with immigration, but was a civil rights suit based on his treatment in jail. Because plaintiff tried to fool the defendant about who he was, the court rightly concluded that the suit was not instituted in the name of the real party in interest. Here, plaintiffs are not trying to mislead the court or the defendant about who they are. They acknowledge that the pseudonyms are not their real names. We note as well that the case that defendant cites to argue that we may raise plaintiff's failure to comply with Rule 17(a) *sue sponte* nowhere mentions that Rule. *See Doe v. United States Dep't of Justice*, 93 F.R.D. 483 (D.Colo.1982). Indeed, the judge in that case did not act *sua sponte*, but only after both parties filed motions, the plaintiff to proceed anonymously and the defendant for a more definite statement that included the name of the plaintiff. *Id.* at 483. Accordingly, we find that Rule 17(a) does not apply to the plaintiff's efforts to proceed anonymously.

harm, or where the injury litigated against would be incurred as a result of the disclosure of the plaintiff's identity. The risk that a plaintiff may suffer some embarrassment is not enough.") (quoting *Doe v. Frank*, 951 F.2d 320, 324 (11th Cir.1992)). Courts have long recognized, however, that the circumstances of a case, particularly where litigants may suffer extreme distress or danger from their participation in the lawsuit, may require that plaintiffs proceed without revealing their true names. Courts have found that plaintiffs could proceed anonymously because they feared that revealing their true identities would lead to physical violence, deportation, arrest in their home countries and retaliation against the plaintiffs' families for bringing suit. *Does v. Advanced Textile Corp.*, 214 F.3d 1058, 1063 (9th Cir.2000). They have also allowed children who were undocumented immigrants to proceed without revealing their true names in a suit seeking to overturn a law that prevented their access to schools in Texas. *Plyler*, 457 U.S. at 202, 102 S.Ct. 2382. People seeking access to abortions at a time when they were generally illegal also received leave to proceed using pseudonyms. *See Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). Courts have allowed those suffering from mental illness to use pseudonyms. *See, e.g., Doe v. Colautti*, 592 F.2d 704 (3d Cir.1979). Children bringing a controversial challenge to a school-sponsored religious program were also granted anonymity in the face of threatened harm for their views. *Doe v. Stegall*, 653 F.2d 180 (5th Cir.1981).

Those federal courts which have ruled on the propriety of anonymous plaintiffs have held that "a district court must balance the need for anonymity against the general presumption that parties' identities are public information and the risk of unfairness to the opposing party." *Advanced Textile*, 214 F.3d at 1068. The Ninth Circuit Court of Appeals, for example, has noted that "we allow parties to use pseudonyms in the 'unusual case' when nondisclosure of the party's identity 'is necessary . . . to protect a person from harassment, injury, ridicule or personal embarrassment.'" *Id.* at 1067-68 (quoting *United States v. Doe*, 655 F.2d 920, 922 n. 1 (9th Cir.1981)). The Fourth Circuit Court of Appeals has similarly found that "[f]ederal courts traditionally have recognized that in some cases the general presumption of open trials – including identification of parties and witnesses by their real names – should yield in deference to sufficiently pressing needs for party or witness anonymity." *James v. Jacobson*, 6 F.3d 233, 242 (4th Cir.1993).

The Third Circuit Court of Appeals has not articulated a standard to weigh litigants' efforts to proceed anonymously. Federal district courts in the Third Circuit, however, have held that "[i]n determining whether a party may proceed under a pseudonym, the public's right of access should prevail unless the party requesting pseudonymity demonstrates that her interests in privacy or security justify pseudonymity." *Doe v. Evans*, 202 F.R.D. 173, 175 (E.D.Pa.2001). They have also articulated factors weighing in favor

and against the use of pseudonyms for plaintiffs. Those factors include: "(1) the extent to which the identity of the litigant has been kept confidential; (2) the bases upon which disclosure is feared or sought to be avoided, and the substantiality of these bases; (3) the magnitude of the public interest in maintaining the confidentiality of the litigant's identity; (4) whether, because of the purely legal nature of the issues presented or otherwise, there is an atypically weak public interest in knowing the litigant's identities; (5) the undesirability of an outcome adverse to the pseudonymous party and attributable to his refusal to pursue the case at the price of being publicly identified; and (6) whether the party seeking to sue pseudonymously has illegitimate ulterior motives." *Doe v. Hartford Life and Accident Ins. Co.*, 237 F.R.D. 545, 549 (D.N.J.2006) (quoting *Doe v. Provident Life & Accident Ins. Co.*, 176 F.R.D. 464, 467-68 (E.D.Pa.1997)). Factors against use of pseudonyms are: "(1)the universal level of public interest in access to the identities of the litigants; (2) whether, because of the subject matter of the litigation, the status of the litigant as a public figure, or otherwise, there is a particularly strong interest in knowing the litigant's identities, beyond the public's interest which is normally obtained; and (3) whether the opposition to pseudonym by counsel, the public, or the press is illegitimately motivated." *Id.* at 550 (quoting *Id.* at 468).

We find that plaintiffs are entitled to proceed anonymously in this matter.[28] We will consider each of

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[28] We agree with the defendant that plaintiffs should have sought formal leave of the court to proceed anonymously. Such failure is not grounds to grant a procedural default to the defendant because we addressed this issue at a preliminary stage of the litigation and no prejudice has occurred to the defendant. Early in the discovery period, plaintiffs sought a protective order from this court directing the defendant not to request information from the Doe plaintiffs that revealed their identities or immigration status. (*See* Motion for Protective Order (Doc. 65)). Defendant offered various reasons why such an order was inappropriate, including an argument that "[n]umerous federal precedents establish clearly that anonymity may not be utilized to avoid disclosure of the identity of an illegal alien." (Brief in Opposition to Motion for a Protective Order (Doc. 67) at 1). After considering these arguments, we granted this motion for a protective order on December 15, 2006. That protective order reads: "The John or Jane Doe Plaintiffs in this proceeding do not have to produce, or otherwise respond to discovery requests seeking disclosure of, 'Protected Material', i.e. those documents, things, information and testimony containing information about their immigration status, actual residence, or place of work that would allow someone to *identify them* or their immigration status." (Memorandum and Order (Doc. 72) at 7) (emphasis added). While we recognize that our ruling on this issue did not address directly whether plaintiffs could proceed anonymously, this order did approve of the unnamed plaintiffs' unwillingness to reveal their real names. Our order came in response to a motion from the plaintiffs for a protective order regarding discovery of their names or immigration status. This early attention to the issue of anonymity cured any prejudice that could have resulted from the failure of plaintiffs to request leave to proceed without revealing their true names. The parties were aware of the presence of this issue in the litigation, we ruled on an immediate and contentious issue related to anonymity, and the parties were able to prepare the litigation without

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the factors raised by district courts in the Third Circuit in addressing such matters.

1. Factors Favoring Anonymity

a. Preservation of Anonymity

The first factor is the extent to which the anonymity of the plaintiffs seeking to use pseudonyms has been preserved. In this case, plaintiffs have vigorously attempted to maintain their anonymity through the trial and deposition process, and no evidence suggests that those attempts have been unsuccessful. These plaintiffs have not given media interviews in which they revealed their names, they have not appeared in public in forums in which they could easily be recognized, and they did not testify live at trial. The record provides no indication that plaintiffs have waived their claim on anonymity by allowing others to discover their true names. This factor weighs in favor of plaintiffs' attempt to proceed anonymously.

b. Bases for Request of Anonymity

Second, courts evaluate the bases for the claim that anonymity is necessary and the legitimacy of those bases. Here, plaintiffs seek to avoid disclosure of their identities because they fear the consequences

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the names of these plaintiffs. Accordingly, we will consider the question of anonymous plaintiffs on the merits.

of such public knowledge and are concerned that defendant may disclose their names to federal immigration authorities. The plaintiffs argue that they have "stated legitimate concerns that the public identification of the Doe Plaintiffs, amidst this highly publicized and controversial lawsuit, would make them easy targets of intense anti-immigrant and anti-Latino sentiment." (Brief in Opposition to Defendant's Motion to Dismiss (Doc. 106) at 97). Plaintiffs also contend that such disclosure may affect "their basic rights to shelter, education, and a livelihood." (*Id.* at 99). We find these compelling reasons for allowing plaintiffs to proceed anonymously.

In *Jane Doe 1 v. Merten,* the Federal District Court for the Eastern District of Virginia refused to allow plaintiffs who sought to challenge a Virginia law that prevented illegal immigrants from obtaining admission to state colleges and Universities to proceed anonymously. 219 F.R.D. 387 (E.D.Va.2004). The students had claimed: "[I]f they are required to reveal their identities, the federal government will seek to deport them or their families and they will thus likely decide not to proceed with this suit, effectively rendering them unable to vindicate their rights in this matter." *Id.* at 390. Defendant cites to this case to support its argument that plaintiffs should be required to reveal their identities, in part because the court in that case found that the plaintiffs seeking to proceed anonymously did not have a strong interest in keeping information about their immigration status confidential.

The court in *Merten* concluded that "unlawful or problematic immigration status is simply not the type of 'personal information of the utmost intimacy' that warrants abandoning the presumption of openness in judicial proceedings." *Id.* We find that the facts and context of this case lead to a different assessment of the nature of information about one's immigration status.[29] Unlike *Merten*, where plaintiffs were seeking

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[29] The court cited no authority that supported this finding about the nature of information on immigration status (though defendant cites approvingly to the holding), but instead pointed to *Southern Methodist University Association of Women Law Students v. Wynne & Jaffe*, a case that refused a request by plaintiffs who were women law students to proceed anonymously in their challenge to a law firm's hiring practices. *See Wynne & Jaffe*, 599 F.2d 707, 713 (5th Cir.1979). We find that the situations faced by women law students during their job search are quite different from those faced by undocumented immigrants who face the possibility that their opponents in a lawsuit will reveal information that could have dire legal consequences. The women law students did not, after all, face the possibility of deportation or exposure to an angry public convinced that their mere presence in the community was a threat to social order. The Court in *Merten* nevertheless acknowledged that in *Plyler*, the Supreme Court permitted "illegal aliens . . . to proceed anonymously in their successful constitutional challenge to the Texas law denying free public grammar school education to illegal alien children." *Merten*, 219 F.R.D. at 391. In a footnote, the *Merten* court pointed out that "it should be noted that in neither *Plyler* nor *Roe [v. Wade]* does it appear that the issue of anonymity was contested or litigated." *Id.* at 391 n. 12. We assign more importance than the *Merten* court did to the fact that plaintiffs in the *Plyler* and Roe cases proceeded anonymously. Apparently, no federal court which examined the *Plyler* case found the use of anonymous plaintiffs troubling enough to address the issue, but instead concluded

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admission to state colleges and universities, the plaintiffs in this case do not seek to receive any goods provided by the state. Further, their immigration status does not determine whether they will be subject to the terms of the ordinance. Accordingly, the individual identities and interests of the plaintiffs are not at issue in this case to the degree they were in *Merten* and are not necessary to reach the issues of constitutionality raised by the lawsuit. The intense public interest in this case makes the risks from exposing sensitive information about one's identity exponentially more dire than in *Merten* and make more persuasive plaintiffs' reasons for seeking to proceed without revealing their true names.

The manner in which public interest has manifested itself in this case demonstrates why anonymity is necessary for plaintiffs who lack a legal immigration status. Trial testimony indicated the intense public interest in the ordinances led at times to harassment and intimidation that created fear even among those with a more secure social and legal status than the anonymous plaintiffs. Dr. Agapito Lopez, a Hazleton resident who became a leader in the attempt to have the ordinances overturned, testified that he organized a candlelight vigil to be

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that the plaintiffs had legitimate reasons for refusing the reveal their true names in that high-profile case. The fact that the parties did not litigate the issue is certainly not evidence that the use of pseudonyms was not vital to allowing the plaintiffs in that case (or in Roe for that matter) to vindicate their rights.

held on the steps of the building where the city council met the night before the ordinances had their second reading. (N.T. 3/12/07 at 73). Attendees at the meeting were very afraid of the consequences of their participation, particularly of the city officials who at Lopez's request videotaped the crowd in an attempt to gather evidence in case of a potential disturbance.[30] The fear of those in his group came "because there was another group that was intimidating us at that time by showing their presence, shouting slogans, and a lot of tension in the area." (*Id.* at 75). At the ordinance's second reading the City's supporters were "very, very tense with stares at the small group of Latinos that were there." (*Id.*). While the City Council was conducting its business that evening a fight had broke out in the street between opponents and supporters of the ordinances. (*Id.* at 76-77). Lopez rushed back out to the street in front of the City Council building to find "[f]ederal justice agents, department of justice agents and policemen in the street dividing two groups." (*Id.* 77). The two groups, consisting of recent immigrants and another group of those supporting the ordinances had faced off, "and there was shouting from one side to the other side." (*Id.*).

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[30] The protestors' reaction to these cameras, despite the benign nature of their presence, indicates that the publicity generated by the ordinances also generated fear among immigrants and particularly Latinos in Hazleton that they would be the subject of government-sponsored harassment and intimidation.

The day before the vigil organized by opponents of the ordinances, Lopez received what he described as "hate mail" underneath the door of his office. (*Id.* at 73). The letter Lopez received purported to describe the effects of illegal immigration, contending that "European Americans are being dispossessed of their own nation. We are under invasion by millions of unskilled Mexicans who threaten to bankrupt us." (N.T. 3/13/07 at 5). The letter further warned that "coloreds" would eventually take control of state governments, Congress and the presidency, and that "[w]hites will quickly be stripped of their rights with our wealth confiscated for redistribution to non-whites as is taking place in South Africa." (*Id.* at 6).

After the ordinances had their second reading Lopez received two other pieces of offensive mail; this mail made him feel both fearful and "offended, because it was hate mail. It indicated hate against me as a person." (N.T. 3/12/07 at 78-79).[31] The first piece

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[31] We note, too, that the ordinances apparently had the effect of increasing racial tension in the City. Jose Luis Lechuga, who first arrived in the United States from Mexico in 1982, had lived in Hazleton since 1991. (N.T. 3/12/07 at 118, 122). When he first came to the City, he felt "like a part of the community. People no longer looked at me like a stranger, because they knew that my wife and I were working people, and so I was accepted in the community." (*Id.* at 123). After the passage of the ordinances, however, Lechuga discovered that "apparently the racial hatred and the racism has awoken. We notice and see that people no longer look at us – they look at us like their enemies now, not our friends." (*Id.* at 124). That Lechuga, a legal resident of the United States, felt such discomfort as a result of the

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of mail suggested that Lopez and his "cohort, that bold, brazen Anna Arias, should spend some time on a few streets in town before defending your (Latin Community)." (N.T. 3/13/07 at 7). After describing what the letter-writer saw as the waste and crime caused by the immigrant residents of Hazleton, the author declared that "[w]e think you and Anna [Arias] had better think twice before you speak."[32] Lopez saw this letter as evidence of "the effect that the ordinance has had on the population," which now failed to "distinguish between undocumented immigrants and Latinos. For them, they are all the same." (*Id.* at 9). The final letter Lopez received[33] contained a clipping from a newspaper describing the effects of illegal immigration as well as a picture of a "warrior" wearing "a huge Mexican hat." (*Id.* at 10). Scrawled

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controversy over the ordinances demonstrates the public controversy created by the ordinances and helps to justify the fears expressed by the anonymous plaintiffs, who do not possess the same legal status as Lechuga.

[32] That statement seems to be connected to a claim that activists like Lopez did nothing to address the crime present in Hazleton, but instead complained about the treatment of immigrants. The passage from which that statement was taken reads: "We think you and Anna had better think twice before you speak. Where were you Friday p.m. when Pine Street playground was once again a scene of trouble? Never see you two show your faces. Signed disgusted citizens." (N.T. 3/13/07 at 8).

[33] The letter was postmarked Hartford, Connecticut. (N.T. 3/13/07 at 9). That the letter did not come from Hazleton demonstrates the wide publicity received by the case, which we find heightens the concerns of the most vulnerable plaintiffs about their participation in the case.

near this picture were the phrases, "[s]ubhuman spic scum" and "[i]f it is brown, flush it down."[34] (*Id.*). Lopez interpreted this mail as an attempt to "silence" and "intimidate" him. (*Id.* at 11). He also "felt afraid" after receiving letters both at his office and at home; the mail let him know that "they know where I live and where I used to work and where my wife works." (*Id.*).

Public expressions of support for Hazleton's ordinances have continued to lead to controversy and confrontations, as well as anger at those who challenge the City's position. On June 3, 2007, several hundred ordinance supporters held a rally in Hazleton to express support for the city's attempts to control illegal immigration. Nichole Dobo, *Barletta Backers Harass Writer*, SCRANTON TIMES-TRIBUNE,,,,,,, June 5, 2007, at A1. Amilcar Arroyo, publisher of EL MENSAJERO, a Hazleton-based Spanish-language newspaper, attempted to cover the event for his publication. *Id.* Arroyo, an American citizen, is not involved in the lawsuit against the City. *Id.* Several members of the

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[34] This piece of mail listed a website, www.nsm88.com, which Hazleton's attorney discovered was attached to the "nationalist socialist movement." (N.T. 3/13/07 at 12). After an introductory page that highlights Nazi imagery and declares the organization to be "Fighting for Race and Nation" the website declares itself "the Official Home Page of the National Socialist Movement, an organization dedicated to the preservation of our Proud Aryan Heritage, and the creation of a National Socialist Society in America and around the world." http://www.nsm88.com/index2.html.

crowd at the rally began to shout at Arroyo after a rumor circulated that he was one of the plaintiffs in the lawsuit against the ordinances. *Id.* Confronting Arroyo, a few rally participants shouted at him to "'get out of the country'" while others chanted "'traitor.'" *Id.* Police escorted Arroyo from the rally for his own protection. *Id.*

We find that this record of hostility to the plaintiffs in the lawsuit and the climate of fear and hostility surrounding the debate over the ordinances creates a justified fear about revealing the anonymous plaintiffs' identities. Dr. Lopez and Mr. Arroyo faced public condemnation and confrontation based on their real or perceived participation in the lawsuit, and they are United States citizens. Those with a more tenuous legal status have an exponentially greater concern over the dangers of participating in a lawsuit that has generated such intense sentiment.

In addition, we find that the defendant does not have a strong need to obtain the identity of the anonymous plaintiffs in order to defend against plaintiffs' suit, thus adding to the reasonableness of plaintiffs' request to keep their identity anonymous. Plaintiffs seek to keep their identities private largely because of their problematic immigration status; they fear the consequences of a public admission of unauthorized residence and employment in the United States. Courts have concluded that plaintiffs may refuse to turn over information on their immigration status when that status is not relevant to the lawsuit. *See Topo v. Dhir*, 210 F.R.D. 76, 78 (S.D.N.Y.2002). Here,

defendant has claimed to need information on the unnamed plaintiffs' immigration status in order to determine whether they have standing to bring suit in the case. Plaintiffs have admitted that they lack legal authorization for their presence and employment in the country, and defendant therefore has all the information necessary to challenge the anonymous plaintiffs' presence in the suit.[35] Defendant's arguments about the standing of such undocumented plaintiffs are based not on the specific facts of each undocumented plaintiff's legal status, but instead on the notion that plaintiffs who are not legally in the United States cannot be injured by the ordinances. The information provided by the anonymous plaintiffs about their immigration status gives the defendant all the information necessary to make this standing claim.

Indeed, plaintiffs have expressed a legitimate fear that exposing their names could lead to adverse legal consequences that go beyond the public disapprobation they face. If threats of exposure of one's legal status can intimidate plaintiffs and prevent them from participating in a lawsuit, the defendant's own statements and actions have added weight to these fears. During discovery in this case, the parties disagreed over whether the anonymous plaintiffs

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[35] We accept these plaintiffs' representations about their immigration status, since such representations are against their legal interest. These plaintiffs admit to a problematic legal status that could lead to their deportation.

should be required to turn over immigration documents to the defendant. After a telephone conference, this court ordered the parties to enter into a confidentiality agreement to protect the identities of the Doe plaintiffs. (*See* Order (Doc. 63)).

After the court issued this order, plaintiffs informed us that a local newspaper had quoted defendant's attorney, who claimed that the order violated 8 U.S.C. § 1373(c) by preventing the city from turning over to the federal government information on the plaintiff's immigration status. *See Munley's IIRA Order Violates Federal Law, Attorney Says*, STANDARD SPEAKER, December 13, 2006 (attached to Motion for a Protective Order (Doc. 64)). The federal law "says no government entity, federal, state or local, may in any way restrict the transfer of information concerning an alien's legal status to the federal government," Hazleton's attorney asserted. (*Id.*). The attorney expressed "surprise" at the order, which he claimed "violates federal law." (*Id.*). Plaintiffs informed us of these statements as part of their motion seeking a protective order preventing disclosure of their identities and immigration status. Given these public statements and court filings, plaintiffs could legitimately fear that defendant was determined to expose their legal status to federal authorities. Such fears could cause plaintiffs to abandon their attempt to secure rights guaranteed them under federal law. We conclude, therefore, that plaintiffs have offered good and compelling reasons for not revealing their

identities. The second factor, then, weighs heavily in favor of anonymity.

c. Magnitude of the Public Interest Involved in Maintaining Confidentiality

The third factor, the magnitude of the public's interest in maintaining the confidentiality of the litigants' identities, also weighs in the anonymous plaintiffs' favor. Hazleton's ordinances have become the subject of wide public debate, and has also served as a model for other communities seeking to act against what they perceive to be the problem of illegal immigration. *See* Anabelle Garay, *Attempts to Curb Illegal Immigration Prove Costly*, WASHINGTON POST, May 6, 2007, at A12 (reporting that "[d]ozens of cities and counties have proposed or passed laws that prohibit landlords from leasing to illegal immigrants, penalize businesses that employ undocumented workers or train police to enforce federal immigration laws."). The public has an interest in determining the constitutionality of ordinances like the one passed in Hazleton, and particularly in determining whether such ordinances violate the constitutional rights of immigrants who lack authorization to enter or work in the United States. Without the protection of anonymity, future such plaintiffs would likely decline to participate in the lawsuit, and the public's interest in testing the constitutionality of certain aspects of such ordinances could remain unexplored.

d. Legal Nature of the Issues in the Case

The fourth factor, whether the purely legal nature of the issues in the case make for an atypically weak public interest in the actual identity of the litigants, also weighs in favor of anonymity. Because this case exists as a test of ordinances passed by Hazleton that seek to transform the role of municipalities in dealing with the presence of undocumented aliens in their jurisdictions, the issues in this case are largely related to the interaction between federal, state and local laws, the application of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution, the meaning of standing in federal jurisprudence and the limits of the privacy protections afforded by the Constitution. This case does not contain the complicated factual scenarios of the typical employment discrimination or prisoner civil rights action faced daily in every federal district court. The decision in this case does not turn on judgements about the credibility of particular witnesses, but instead on an assessment of the parties' legal arguments. Indeed, the only reason defendant cites for needing to know the identity of the anonymous plaintiffs is to address their standing to sue. While standing is a clear constitutional requirement, it is also a preliminary question and one we find we can answer for the anonymous plaintiffs without discovery of their identities. Defendant makes no argument that other factual or legal issues in the case require knowing the

identity of plaintiffs. Defendant, therefore, has less interest in the identity of the particular plaintiffs than in the resolution of the legal issues in this case. This factor clearly weighs against disclosure of the plaintiffs' identities.

e. Danger of Adverse Outcome to Unnamed Plaintiffs

We find that the fifth factor, the undesirability of an outcome adverse to the pseudonymous parties and attributable to their refusal to pursue the case at the price of being publicly identified, has a neutral weight in our analysis. While an adverse outcome for the anonymous plaintiffs could have significant consequences, limiting their ability to find housing and secure employment, that adverse outcome would not be solely or even primarily attributable to the anonymous plaintiffs' refusal to participate because of the possibility of being identified publicly This case, which will be decided largely by answering legal questions on issues like federal preemption, does not turn on the particular facts of the plaintiffs' experience with the law. Other named litigants who could press the issue of the constitutionality of the ordinances would remain, and the outcome of the case would not be determined by the decision of the anonymous plaintiffs to abandon their lawsuit. This factor, therefore, does not weigh significantly for either side of the argument.

f. Whether Plaintiffs Have Ulterior Motives for Seeking Anonymity

We find that the sixth factor, whether the plaintiffs seeking to proceed anonymously have illegitimate ulterior motives, weighs in favor of the plaintiffs' anonymity. The reason for the plaintiffs' desire to use pseudonyms in this case is clear: they wish to avoid the potential harm that will come from disclosure of their names to the defendant and to the public. They fear that disclosing their identities could expose them to danger and adverse legal action unrelated to the rights they seek to vindicate in this litigation. Defendant does not point to any improper motive of the plaintiffs in seeking to proceed without being identified.[36] We thus find no improper motive behind plaintiffs' request to proceed without identifying themselves. This factor weighs in favor of anonymity.

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[36] In an earlier response to a plaintiff's motion for a protective order preventing disclosure of identity and information related to immigration status, however, defendant argued that plaintiff's had engaged in a "shell game" of substituting different anonymous plaintiffs. We found that problem not genuine at the time we issued the protective order; we find that problem even less likely now, as defendant has had the opportunity to depose the anonymous plaintiffs and has attached them to a particular set of identifying factors.

2. Factors Favoring Disclosure

a. Public Interest in Plaintiffs' Identities

Of the factors in favor of disclosure of the anonymous plaintiffs' identities, we find that the first of those factors, the universal level of public interest in access to the identities of the litigants, does not support a need for disclosure. There is widespread public interest in this case, but that interest is focused not on the identities of the plaintiffs, but on the legal issues at the heart of the case. We find no evidence of a widespread, much less universal, public interest in the identities of the plaintiffs. The public's interest in this case is in the right of Hazleton to press forward with its legislation, not in a dispute between the parties. Accordingly, the public's interest in the identities of the individual plaintiffs is not so strong as to justify the danger of disclosing the identity of plaintiffs with a legitimate fear for the consequences of that disclosure.

a. Subject Matter of the Litigation

The next factor in favor of disclosure asks whether, because of the subject matter of the litigation, the status of the litigant as a public figure, or otherwise, there is a particularly strong interest in knowing the litigant's identities, beyond the public's normal interest. This factor too does not weigh in favor of disclosure. The subject matter of this litigation is primarily constitutional law, and the

identities of the particular plaintiffs are not as important to the outcome of the litigation as the legal arguments they raise. In addition, the plaintiffs seeking anonymity here are not public figures, and thus there is scant public need to follow their activities in order to prevent abuse of some public trust.

c. Motivation for Seeking Identity

The final factor for the court to consider addresses whether the opposition to pseudonyms by counsel, the public, or the press is illegitimately motivated. While we do not find persuasive power in defendant's argument that learning the identity of the anonymous plaintiffs is necessary to determine whether they have standing to sue, we have no evidence to indicate that defendant adopted this position for illegitimate reasons. We note, however, that federal courts have recognized that inquiries into immigration status can have an *in terrorem,* effect, limiting the willingness of plaintiffs to pursue their rights out of fears of the consequences of an exposure of their position. *See Topo v. Dhir,* 210 F.R.D. 76, 78 (S.D.N.Y.2002) (holding that "[c]ourts have generally recognized the *in terrorem* effect of inquiring into a party's immigration status when irrelevant to any material claim."); *Zeng Liu v. Donna Karan International, Inc.,* 207 F.Supp.2d 191, 193 (S.D.N.Y.2002) (finding that disclosing immigration status when not relevant to the case presents a "danger of intimidation [that] would inhibit plaintiffs in pursuing their rights."). In this case, then, we lack evidence that

defendant had illegitimate motives in challenging plaintiffs' use of anonymity, but recognize the potential intimidation that accompanied that challenge. We find, therefore, that this factor weighs neither for nor against disclosure.

In sum, we find that the factors in favor of confidentiality for the plaintiffs who seek to proceed anonymously outweigh those that recommend disclosure. The highly legal nature of the issues here, combined with the intense public interest and strong level of emotion connected with the issue mean that the undocumented immigrants who seek to participate in this action face extraordinary circumstances that require anonymity if they hope to proceed without facing unsupportable burdens. The public's interest in learning the identity of the litigants does not outweigh the anonymous plaintiff's concerns, and defendant can defend itself adequately without information about the anonymous plaintiffs' identities. Accordingly, we find that the anonymous plaintiffs may proceed without identifying themselves.

We note, finally, that we find misplaced defendant's concern that this court's acknowledgment of the Doe plaintiffs' right to proceed anonymously would "recognize" and "affirm" an "interest in evading the laws of the United States." (Memorandum of Law in Opposition to Plaintiffs' Cross-Motion for Summary Judgment (Doc. 150) at 107). A venerable principle of constitutional law holds that all persons in the United States have rights under the Fourteenth Amendment to the United States Constitution,

whether they are citizens or not.[37] *See Plyler v. Doe,* 457 U.S. 202, 210, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982) (holding that "[w]hatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments."); *Yick Wo v. Hopkins,* 118 U.S. 356, 369, 6 S.Ct. 1064, 30 L.Ed. 220 (1886) (holding that "[t]he Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws."). The Doe plaintiffs' interest in this case is in vindicating rights they claim are

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[37] We note that the descendants of non-Asian immigrants who entered this country before the immigration restrictions of the 1920s who condemn present-day illegal immigrants by pointing out that "when my relatives came to this country, they followed the law" ignore one very crucial fact: virtually no law existed to prevent anyone from entering the country prior to that period. No federal crime for unauthorized entry existed until 1929. *See* Mae M. Ngai, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF AMERICA, 60 (2004). For a broader reading on United States immigration history please see the appendix.

guaranteed them under the Constitution, and those rights exist whatever their status under the nation's immigration laws. Allowing the Doe plaintiffs to proceed anonymously in the unique conditions of this case would not reward them for evading the country's immigration laws.[38] It would instead provide them an opportunity to secure the rights guaranteed them by the Constitution of the United States.

C. Amendments to the Ordinance

On March 15, 2007, during this court's trial of this matter, defendant introduced Ordinance 2007-6, which has since become law in the city. *See* Ordinance 2007-6 (Defense Ex. 251). This Ordinance Amended Sections 4B(2) and 5(B)(2) of IIRA. *Id.* As originally written, "a complaint which alleges a violation solely or primarily on the basis of national origin, ethnicity or race" would not be enforced. Ordinance 2006-18 at § 4B(2). The 2007 amendment removed the words "solely or primarily" from these provisions, meaning that "a complaint which alleges a violation on the basis of national origin, ethnicity or race shall be deemed invalid and shall not be enforced." Ordinance

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[38] Indeed, even if we were to agree with every argument made by the plaintiffs in this case and issue a permanent injunction preventing Hazleton from enforcing any of the challenged ordinances, the federal government could still independently of this action discover the identities of the anonymous plaintiffs and deport those whose presence in the United States is contrary to federal law.

2007-6. The amendment also altered Section 4.A of the Ordinance by adding the word "knowingly" to a provision prohibiting the recruitment and hiring of illegal aliens. *Id.*; *see* Ordinance 2006-18 at § 4.A (establishing that: "It is unlawful for any business entity to knowingly recruit, hire for employment, or continue to employ, or to permit, dispatch, or instruct any person who is an unlawful worker to perform work in whole or part within the City."). At the end of the hearing on the plaintiffs' complaint, we asked the parties for briefs on the effect of this amendment on the instant litigation.

The parties agree that the court has jurisdiction to issue a decision on the current version of the ordinance. Plaintiffs argue, however, that we should also rule on the version of the ordinance that existed until the March amendment. Defendant amended the ordinance, plaintiffs argue, to avoid having this court rule on the constitutionality of the ordinance as it then existed. That amendment did not come, plaintiffs insist, because Defendant recognized that the previous version of the ordinance violated the constitution, but simply to improve defendant's litigation position. Accordingly, the court could reasonably conclude that defendant will not cease the illegal practice embodied in the earlier version of the ordinance.

The dispute between the parties here is over whether we should also consider the version of the ordinance that was in effect through most of the litigation in this matter. We find that we do not have jurisdiction to rule on the constitutionality of a version of an

ordinance that no longer exists, particularly when we have – as both sides admit – jurisdiction to examine the current version of that ordinance. The cases cited by the plaintiffs to argue that we should rule on that older version of HRA all address whether a court has jurisdiction to hear a challenge to a practice or an ordinance that the defendant has voluntarily terminated, not whether a court has jurisdiction to address both the old and new versions of an amended ordinance. *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982) (finding that voluntarily abandoning a challenged practice does not moot answering the question raised by the lawsuit, since "the city's repeal of the objectionable language would not preclude it from reenacting precisely the same provision if the District Court's judgement were vacated."); *United States v. Government of the Virgin Islands*, 363 F.3d 276, 286 (3d Cir.2004) (finding that "when a party does not change its 'substantive stance' as to the validity of the contract but merely terminates it for allegedly purely practical reasons (such as avoiding litigation), the termination of the contract does not render the case moot" because nothing would prevent the defendant from engaging in the same or similar contracts); *Penny Saver Pubs., Inc. v. Village of Hazel Crest*, 905 F.2d 150 (7th Cir.1990)[39]; *Reynolds v. City of Valley*

[39] The facts of this case do not support plaintiffs' position. Plaintiffs argue that "the Circuit Court has also rejected the government actor's claims of mootness where the action allegedly mooting the case was taken 'with litigation lurking a few days

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Park, No. 06-CC-3802, 2007 WL 857320 (St. Louis County, MO Circuit Court, March 12, 2007) (available at http://clearinghouse.wustl.edu/chDocs/public/IM-MO-0001-0017.pdf).[40] Those courts did not address whether a court could decide on two versions of the same ordinance, the second of which amended the

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away' and where the circumstances suggested that the impending litigation was the cause of the determination." (Doc. 218 at 79). In that case, plaintiff, a suburban newspaper company, sought an injunction against a village ordinance that limited solicitation of real estate clients. *Penny Saver*, 905 F.2d at 152. While the litigation was pending, the Village amended the ordinance to exempt newspapers. *Id.* Separate litigation over the amended ordinance continued. *Id.* at 153. The court found that litigation over the previous ordinance was moot "because the Ordinance, as amended, cannot be applied to Penny Saver." *Id.* The entire case was not moot, however, since the plaintiff had a "viable claim for declaratory and monetary relief" based on the village's actions in relation to the previous ordinance. *Id.* The facts of this case actually do more to support our conclusion that we lack authority to rule on the constitutionality of the previous version of the ordinance.

[40] This case dealt with a similar ordinance meant to control illegal immigration. The city of Valley Park had passed ordinances in July 2006 that penalized "'aid[ing] and abet[ting] illegal aliens or illegal immigration' and 'leasing or renting'" property to illegal aliens. *Reyonlds*, at ¶¶ 3-4. The City apparently repealed those ordinances after litigation began. *Id.* at ¶ 10. The court nevertheless decided that the case was not moot, since "a defendant cannot unilaterally moot the litigation by repealing the ordinance." *Id.* at Conclusions of law ¶ 2). Here, then, the court ruled on the old ordinances because they had been repealed, but no new ordinances had been passed on which the court could rule. That situation is different from the situation here, since we can rule on the current form of the ordinance, which raises concerns quite similar to the old one.

first. Instead, they addressed whether repealing an ordinance or terminating a contract necessarily made a plaintiffs' case against that ordinance or contract moot. Like those courts, we conclude that the amendment of the IIRA did not moot the case; our duty is to address IIRA as it now stands.

In any case, the controversy over the earlier version of IIRA is moot. That ordinance no longer exists, and plaintiffs' complaints about that former ordinance are no longer operative. *See, e.g., Nextel Partners*, 286 F.3d at 693 (holding that "[I]f a claim no longer presents a live case or controversy, the claim is moot, and a federal court lacks jurisdiction to hear it."). In addition, because we have before us a version of IIRA in which plaintiffs find constitutional infirmities similar to those in the previous IIRA, little danger exists that our decision not to rule on the previous IIRA would allow defendant to evade review and reenact that earlier ordinance. *See City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 283 n. 1, 121 S.Ct. 743, 148 L.Ed.2d 757 (2001) (holding that "a party should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior."); *City of Mesquite*, 455 U.S. at 289, 102 S.Ct. 1070 (determining that repeal of a statute did not moot the lawsuit because "the city's repeal of objectionable language would not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated."). Though courts have recognized that "a matter is not necessarily moot simply because the order attacked

has expired; if the underlying dispute between the parties is one 'capable of repetition', yet evading review, it remains a justiciable controversy within the meaning of Article III." *New Jersey Turnpike Authority v. Jersey Central Power and Light*, 772 F.2d 25, 31 (3d Cir.1985). Here, the fact that we will rule on the successor to the Ordinance that provoked the original suit demonstrates that the issues raised by the first set of ordinances are available for review, and we find no need to rule on the previous versions.

Now that the preliminary matters have been disposed of, we will address the underlying merits of the plaintiffs' case. Plaintiffs' complaint raises federal constitutional issues, federal statutory issues and state law issues. We shall address each in turn.

II. FEDERAL CONSTITUTIONAL ISSUES

Plaintiffs first three causes of action and the eighth cause of action are brought pursuant to 42 U.S.C. § 1983 (hereinafter "section 1983") for constitutional violations. In pertinent part, section 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in

> an action at law, suit in equity or other proper proceeding for redress[.]

42 U.S.C. § 1983.

Thus, to establish a claim under section 1983, two criteria must be met. First, the conduct complained of must have been committed by a person acting under color of state law. Second, the conduct must deprive the complainant of rights secured under the Constitution or federal law. *Sameric Corp. of Delaware, Inc. v. City of Philadelphia,* 142 F.3d 582, 590 (3d Cir.1998).

In the instant case, no question exists as to whether the defendant acted under the color of state law in enacting the ordinances at issue. The only issue with regard to section 1983, therefore, is whether the ordinances violate plaintiffs' constitutional rights. Plaintiffs assert that the defendant violated the United States Constitution's Supremacy Clause, Due Process Clause, Equal Protection Clause and privacy guarantees. We will address each separately.

A. Federal Pre-emption

Plaintiffs' Amended Complaint asserts that Hazleton's ordinances violate the Supremacy Clause of the United States Constitution, which provides that federal law is the supreme law of the land. (Second Amended Complaint (Doc. 82) (hereinafter

"Compl.") ¶¶ 100-131). In particular, the Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

Accordingly, "[t]he Supremacy clause of the United States Constitution invalidates state laws that 'interfere with or are contrary to' federal law." *New Jersey Payphone Ass'n, Inc. v. Town of West New York*, 299 F.3d 235 (3d Cir.2002) (quoting *Gibbons v. Ogden*, 22 U.S. 1, 9 Wheat. 1, 6 L.Ed. 23 (1824)). This invalidation is termed federal pre-emption. Federal preemption can be either express or implied. *Olde Discount Corp. v. Tupman*, 1 F.3d 202, 216 (3d Cir.1993). We will discuss each in turn. As the ordinances at issue have two distinct provisions, one directed to employment issues and one aimed at landlord/tenant issues, we will discuss each topic separately with regard to pre-emption beginning with the employment provisions.[41]

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[41] Defendant contends that we should apply a presumption that the Congress does not intend to supersede state law. In support of this proposition, defendant cites *Medtronic, Inc. v.*

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1. Employment provisions of IIRA

a. Express pre-emption

Initially, plaintiffs assert that the federal law expressly pre-empts IIRA. Under federal law, "Congress can define explicitly the extent to which its enactments pre-empt state law." *English*, 496 U.S. at 78, 110 S.Ct. 2270. Preemption is "express" when a statute explicitly commands that state law be displaced. *Green v. Fund Asset Management, L.P.*, 245 F.3d 214, 222 (3d Cir.2001) (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 382, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992)).

Plaintiffs assert that the federal Immigration Reform and Control Act of 1986 (hereinafter "IRCA"),

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Lohr, 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996). *Medtronic* does set forth such a presumption; however, it also states that this presumption applies "particularly . . . in a field which the States have traditionally occupied." *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947)). The presumption is inapplicable "when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108, 120 S.Ct. 1135, 146 L.Ed.2d 69 (2000). Immigration is an area of the law where there is a history of significant federal presence and where the States have not traditionally occupied the field. In fact, as set forth more fully below, immigration is a federal concern not a state or local matter. Therefore, we do not apply the presumption against pre-emption. If, however, we were to apply the presumption, our ultimate conclusion would not change as Congress has made it sufficiently clear and manifest that federal law pre-empts state law in the area covered by Hazleton's ordinances.

which deals with the employment of unauthorized aliens, contains an express pre-emption clause that pre-empts the employer portions of IIRA. Defendant argues that IIRA does not fall within IRCA's express pre-emption clause. After a careful review, we agree with the plaintiffs that IIRA's employment provisions are expressly pre-empted.

IRCA is a "comprehensive scheme" that prohibits the employment of unauthorized workers in the United States. *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 147, 122 S.Ct. 1275, 152 L.Ed.2d 271 (2002). "IRCA 'forcefully' made combating the employment of illegal aliens central to '[t]he policy of immigration law.'" *Id.* (citing *INS v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 194, and n. 8, 112 S.Ct. 551, 116 L.Ed.2d 546 (1991)).

The law prohibits the employment of aliens who are 1) not lawfully present in the United States; and 2) not lawfully authorized to work in the United States. 8 U.S.C. § 1324a(h)(3). In order to prevent the employment of unauthorized workers, IRCA requires that employers verify the identity and eligibility for work of all new hires. This verification is accomplished with the employer's review of specified documents. 8 U.S.C. § 1324(a)(b). An employer cannot hire an alien who is unable to present proper documentation. 8 U.S.C. § 1324(a)(1).

Under IRCA, where an employer unknowingly hires an unauthorized alien or if an employee becomes unauthorized, the employer must discharge the

employee when his status becomes known. 8 U.S.C. § 1324a(a)(2). Violations of IRCA by employers is punishable by civil fines and criminal prosecution. 8 U.S.C. § 1342a(e)(4)(A); 1324a(f)(1). Prospective employees are subject to criminal prosecutions and fines for providing fraudulent documents. 8 U.S.C. § 1324c(a).

IRCA contains an express pre-emption clause that pre-empts State or local laws dealing with the employment of unauthorized aliens. The preemption clause provides: "The provisions of this section pre-empt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2).

The plaintiffs assert that this section expressly pre-empts IIRA. Defendant disagrees, contending that it has followed 8 U.S.C. § 1324a(h)(2) with "exacting precision." (Doc. 87, Def. Brief at 37). According to Hazleton, it has "eschewed the imposition of criminal or civil penalties and has instead taken those actions expressly permitted by Congress." (*Id.*). Instead of criminal and civil sanctions, IIRA penalizes a business for employing an unauthorized alien by suspending its business permit. Such a business permit suspension amounts to "licensing and similar laws" as provided by the IRCA preemption section according to the defendant. In other words, Hazleton interprets the statute so as to allow regulation of employers with regard to hiring unauthorized workers as long as instead of a criminal or civil

sanction, the sanction that is imposed is the suspension of the employer's business permit.

We reject Hazleton's interpretation of the express pre-emption provision. Under Hazleton's interpretation of the provision, a state or local municipality properly can impose any rule they choose on employers with regard to hiring illegal aliens as long as the sanction imposed is to force the employer out of business by suspending its business permit – what we could call the "ultimate sanction." This interpretation is at odds with the plain language of the express preemption provision, which is concerned with state and local municipalities creating civil and criminal sanctions against employers. It would not make sense for Congress in limiting the state's authority to allow states and municipalities the opportunity to provide the ultimate sanction, but no lesser penalty. Such an interpretation renders the express preemption clause nearly meaningless.

In addition to being counterintuitive to the plain language of the provision, Hazleton's interpretation is contrary to its legislative history. In House Report No. 99-682(I), the United States Congress provides its interpretation of the type of "licensing" permitted under the statute. The "licensing" that the statute discusses refers to revoking a local license for a violation of the federal I RCA sanction provisions, as opposed to revoking a business license for violation of local laws.

The Report authored by the House Committee on the Judiciary states:

> The penalties contained in this legislation are intended to specifically preempt any state or local laws providing civil fines and/or criminal sanctions on the hiring, recruitment or referral of undocumented aliens. They are not intended to preempt or prevent lawful state or local processes concerning the suspension, revocation or refusal to reissue a license to any person who has been found to have violated the sanctions provisions in this legislation. Further, the Committee does not intend to preempt licensing or "fitness to do business laws," such as state farm labor contractor laws or forestry laws, which specifically require such licensee or contractor to refrain from hiring, recruiting or referring undocumented aliens.

H.R. No. 99-682(I) at 5662.

Therefore, the express pre-emption clause applies generally, except for state or local laws dealing with "suspension, revocation or refusal to reissue a license" to an entity found to have violated the sanction provisions of IRCA.

In the instant case, Hazleton suspends the business permit of those who violate its Ordinance, not

those who violate IRCA.[42] Thus, the licensing exception to State and local pre-emption is not applicable.

The other express pre-emption exception is for "fitness to do business laws" such as state farm labor contractor laws or forestry laws. 8 U.S.C. § 1324a(h)(2). Hazleton's ordinances are not "fitness to do business laws such as state farm labor contractor laws or forestry laws." Fitness to do business laws generally deal with a person's character as it relates to his or her ability to be engaged in a certain business activity. An example of such a law is the California statute describing the prerequisites for issuance or renewal of a farm labor contractor license. CAL. LABOR CODE § 1684 (West 2006). This statute requires that those seeking such a license must, *inter alia*: provide a statement that they possess the character, competency and responsibility to conduct the operations of the business; provide a bond based upon the amount of their payroll; take part in certain training; and not be found in violation of certain laws and regulations.[43] *Id.* By way of comparison, IIRA is aimed at preventing employers from hiring undocumented aliens. Thus, they are not fitness to do

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[42] As explained more fully below, the Hazleton Ordinance differs significantly from IRCA.

[43] A person must also be registered as a farm labor contractor pursuant to the federal Migrant and Seasonal Agricultural Worker Project Act ("MSAWPA", 29 U.S.C. 1801 *et seq.*) in order to obtain a license under the California law. For registration under the MSAWPA, a person must not violate IRCA. 29 U.S.C. § 1813(a)(6).

business laws. Therefore, this exception to pre-emption does not apply.

As the exceptions to pre-emption do not apply, IRCA expressly preempts the employment provisions of IIRA.

Additionally, IIRA provides more than the sanction of business permit suspension. It creates a cause of action for discharged employees. IIRA makes it an "unfair business practice" for an employer to discharge a worker who is not "unlawful" if, at the time, it employs an unlawful worker. (IIRA § 4.E.1). It provides that such a discharged worker may commence a private cause of action against the business and seek treble damages, attorney's fees and costs. (IIRA § 4.E.2(a) and (b)). Without providing any cogent analysis, defendant asserts that this sanction is similar to licensing, and therefore, is not pre-empted. We are unconvinced. This sanction certainly falls within the express pre-emption clause. It does not involve licensing or anything similar to licensing.

For all of the above reasons, we find that IRCA's express preemption provision applies to IIRA's employment provisions. Thus, the Ordinance's employment provisions violate the Supremacy Clause of the United States Constitution.

b. Implied pre-emption

Although we find IIRA is expressly preempted, for purposes of completeness we will also discuss

implied pre-emption. Even if Congress places an express pre-emption clause in a statute, implied pre-emption may still be applicable. *Freightliner Corp. v. Myrick,* 514 U.S. 280, 288-89, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995). Plaintiffs allege that IIRA unconstitutionally conflicts with federal immigration law. Implied pre-emption can be found where the scope of the federal law at issue "indicates that Congress intended federal law to occupy the field exclusively" or where state or local laws conflict with federal laws. *Id.* at 287, 115 S.Ct. 1483. Implied pre-emption thus includes two separate concepts, field preemption and conflict preemption. We will discuss each.

i. Field pre-emption

Field pre-emption occurs where Congress has occupied a given subject area to the preclusion of State or local laws. Where field preemption is present "the subject matter of the federal and local laws is such that the two laws or regulatory schemes must inherently either conflict or be duplicative". That is, under this test it is impossible to have local regulation in the subject area that does not conflict with or duplicate federal regulation. *Rogers v. Larson,* 563 F.2d 617, 621 (3d Cir.1977). Field preemption exists where the federal regulatory scheme is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947). Field pre-emption is present where 1) "the pervasiveness of the federal

regulation precludes supplementation by the States"; 2) "the federal interest in the filed is sufficiently dominant" or 3) "the object sought to be obtained by the federal law and the character of obligations imposed by it reveal the same purpose." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300, 108 S.Ct. 1145, 99 L.Ed.2d 316 (1988).

In the instant case, the first two of these situations are met, and we shall discuss them separately.

aa. Federal interest in the field

The first factor we will consider is the dominance of the federal interest in the field of immigration. The history of federal regulation of immigration is one of the creation of an intricate and complex bureaucracy that restricted who could immigrate to the United States and under what terms. Those immigration regulations have also come to define the conditions under which aliens can find employment in the country. The creation of this complex federal bureaucracy not only altered the role of the federal government in relation to immigration. It also transformed the status of immigrants in American society. A foreign-born person in the United States in 1870 had a presumptively legal statutes; no careful legal inquiry was required to determine whether that person had a right to reside in the country. By 1990, however, determining whether a foreign-born person enjoyed a legal right to remain in the United States

demanded a detailed legal examination that involved numerous federal status, several adjudicatory bodies, and a number of appeals and exceptions. More than one hundred years of federal regulation have made the federal supremacy over immigration an intricate affair. We provide here a general summary of nature of federal immigration regulation since the first such regulation appeared at the end of the nineteenth century. For a more detailed examination of the history of federal immigration regulation, see the appendix to this decision.

The federal government possesses an especially strong interest in immigration matters. The United States Constitution provides that Congress shall have the power "[t]o establish an uniform Rule of Naturalization[.]" U.S. CONST. art. I, sect. 8, cl. 4. Thus, "[t]he power to regulate immigration – an attribute of sovereignty essential to the preservation of any nation – has been entrusted by the Constitution to the political branches of the Federal Government." *United States v. Valenzuela-Bernal*, 458 U.S. 858, 864, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982). The *Valenzuela-Bernal* Court states that "[o]ne cannot discount the importance of the Federal Government's role in the regulation of immigration." *Id.* (citing *Mathews v. Diaz*, 426 U.S. 67, 81, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976)) ("For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government"); *Galvan v. Press*, 347 U.S. 522, 531, 74

S.Ct. 737, 98 L.Ed. 911(1954) ("that the formulation of [immigration] policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government").

Conversely, the individual states, or municipalities located in those states, do not have a strong interest in immigration. The Supreme Court has explained that

> "[t]he States enjoy no power with respect to the classification of aliens". *See Hines v. Davidowitz,* 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941). This power is "committed to the political branches of the Federal Government." *Mathews [v. Diaz],* 426 U.S. [67], at 81, 96 S.Ct. 1883, 48 L.Ed.2d 478 [1976]. Although it is "a routine and normally legitimate part" of the business of the Federal Government to classify on the basis of alien status, *id.,* at 85, 96 S.Ct., at 1894, and to "take into account the character of the relationship between the alien and this country," *id.,* at 80, 96 S.Ct., at 1891, only rarely are such matters relevant to legislation by a State. *See Id.,* at 84-85, 96 S.Ct., at 1893-1894; *Nyquist v. Mauclet,* 432 U.S. 1, 7, n. 8, 97 S.Ct. 2120, 2124, n. 8, 53 L.Ed.2d 63 (1977).

Plyler v. Doe, 457 U.S. 202, 225, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982).

Bearing in mind the interests of the local government versus the federal government in the areas of immigration, we proceed to our analysis of whether the federal government has pervasively regulated this field.[44]

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[44] Both Hazleton's mayor and city council president acknowledged during the trial that the federal government has the power to address the immigration problem but they also expressed the opinion that the federal government is not adequately addressing the issue. (N.T. 3/14/07 at 197-98; N.T. 3/13/07 at 180-81, 195-96). A federal program exists that creates a law enforcement partnership between the Department of Homeland Security, Bureau of Immigration and Customs Enforcement and local law enforcement agencies. (P-83, HAZ 00167). The program allows local law enforcement officers to work in conjunction with U.S. Immigration and Customs Enforcement Officers and assist the federal government with processing the deportation of criminal aliens. (*Id.*, N.T. 3/20/07 at 32). It provides for the federal government to enter into "agreements with state and local enforcement agencies, permitting designated officers to perform immigration law enforcement functions, pursuant to a Memorandum of Understanding (MOU), provided that the local law enforcement officers receive appropriate training and function under the supervision of sworn U.S. Immigration and Customs Enforcement (ICE) Officers." (P-183 at HAZ 00167). Hazleton's police chief did not inquire into this program until after the instant ordinances were passed. (P-83, at HAZ 00168). The police department has since applied for the program but has not yet followed through on the application as police chief believes the benefits would not outweigh the costs. (N.T. 3/21/07 at 35-36). The police chief sees very little benefit because the ICE has already been "very responsive" to their requests regarding criminal aliens. (*Id.* at 36).

bb. Pervasiveness of regulations

The second factor we consider is the pervasiveness of the federal regulations. *Schneidewind*, 485 U.S. at 300, 108 S.Ct. 1145. Congress has occupied the field of employment of unauthorized aliens with IRCA. The Supreme Court has noted that IRCA is "a **comprehensive scheme** prohibiting the employment of illegal aliens in the United States." *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 137, 122 S.Ct. 1275, 1282, 152 L.Ed.2d 271 (2002) (emphasis added). The Supreme Court has explained IRCA as follows:

> As we have previously noted, IRCA "forcefully" made combating the employment of illegal aliens central to "[t]he policy of immigration law." *INS v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 194, and n. 8, 112 S.Ct. 551, 116 L.Ed.2d 546 (1991). It did so by establishing an extensive "employment verification system," § 1324a(a)(1), designed to deny employment to aliens who (a) are not lawfully present in the United States, or (b) are not lawfully authorized to work in the United States, § 1324a(h)(3). This verification system is critical to the IRCA regime. To enforce it, IRCA mandates that employers verify the identity and eligibility of all new hires by examining specified documents before they begin work. § 1324a(b). If an alien applicant is unable to present the

> required documentation, the unauthorized alien cannot be hired. § 1324a(a)(1).

Hoffman Plastic Compounds, Inc. v. N.L.R.B., 535 U.S. 137, 147-48, 122 S.Ct. 1275, 152 L.Ed.2d 271 (2002) (footnote omitted).

IRCA occupies the field to the exclusion of State or local laws regarding employers hiring, employing, recruiting or referring for a fee for employment unauthorized aliens. Congress has indicated that one of the central features of federal immigration policy is controlling the employment of unauthorized workers. *Id.* IRCA provides for the prohibition of employing unauthorized workers and explains the manner in which an employer may be found liable for violating the statute and also how the employer can seek review of adverse decisions. *See generally,* 8 U.S.C. § 1324a(e). It provides for various penalties. 8 U.S.C. § 1324a(e)(5) (providing for civil fines); 8 U.S.C. § 1324a(f) (providing a criminal penalty); 8 U.S.C. § 1324c (providing penalties for document fraud). IRCA also contains a section that prohibits unfair immigration-related employment practices. 8 U.S.C. § 1324b.

Thus, IRCA is a comprehensive scheme. It leaves no room for state regulation. As explained more fully below, where we discuss conflict preemption, any additions added by local governments would be either in conflict with the law or a duplication of its terms – the very definition of field pre-emption.

Accordingly, we conclude that the Ordinance as it applies to employers is field pre-empted. Immigration is a national issue. The United States Congress has provided complete and thorough regulations with regard to the employment of unauthorized aliens including anti-immigration discrimination provisions. Allowing States or local governments to legislate with regard to the employment of unauthorized aliens would interfere with Congressional objectives.

The case that defendant primarily relies upon as controlling precedent is *DeCanas v. Bica*, 424 U.S. 351, 96 S.Ct. 933, 47 L.Ed.2d 43 (1976). *DeCanas* addressed a California statute that provided "(n)o employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers." *Id.* at 352, 96 S.Ct. 933 *quoting* California Labor Code Ann. § 2805(a). A trial court in California found that federal law pre-empted the California statute. *Id.* at 353, 96 S.Ct. 933. The California Court of Appeal found the statute to be an attempt to regulate the conditions for admission of foreign nationals. *Id.* Congress has exclusive authority over immigration and naturalization, thus, the statute was preempted according to the California court. *Id.* The Supreme Court of California denied review, and the United States Supreme Court granted *certiorari*. *Id.* at 354, 96 S.Ct. 933.

The Supreme Court disagreed with the California courts. It concluded that the "[p]ower to regulate immigration is unquestionably exclusively a federal

power." *Id.* at 354, 96 S.Ct. 933. The Court explained, however, that just because a statute touches upon immigration, does not make it an impermissible regulation of immigration. Not "every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted." *Id.* at 355, 96 S.Ct. 933. A "regulation of immigration . . . is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *Id.*[45]

The Court proceeded to discuss field pre-emption. With regard to field pre-emption, the Court reviewed the Immigration and Naturalization Act ("INA") and found its central concern is "with the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country." *Id.* at 359, 96 S.Ct. 933. The Court noted that although the statute provided a comprehensive scheme for the regulation of immigration and naturalization "without more" it could not conclude that the employment of illegal aliens was within the "central aim" of the law. *Id.* The Court only found a peripheral concern with the employment of illegal entrants in the INA. *Id.* at 360, 96 S.Ct. 933. This peripheral concern

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[45] Plaintiffs argue that the instant ordinances are impermissible regulations of immigration. Based upon this definition of "regulation of immigration" however, we find that the laws are not unconstitutional on that ground. They do not regulate who can or cannot be admitted to the country or the conditions under which a legal entrant may remain.

was evidenced in a proviso to one of the statute's sections that indicated employment of an illegal entrant was not harboring. *Id.* Thus, field pre-emption with regard to the employment of illegal aliens was inapplicable.[46]

Since, *DeCanas,* however, Congress has passed IRCA. Instead of employment being only addressed in a proviso to one section of the INA, a complete statutory scheme has now been enacted that addresses the employment of unauthorized workers. Therefore, defendant's reliance on *DeCanas* is misplaced.[47]

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[46] The Court then reviewed conflict pre-emption. It concluded that the record was not sufficiently complete to provide a conflict-preemption review and remanded the case to the California court for this determination. *DeCanas,* 424 U.S. at 363, 96 S.Ct. 933.

[47] Defendant also relies on *Incalza v. Fendi North America, Inc.,* 479 F.3d 1005 (9th Cir.2007) to support its position that pre-emption is applicable. This case does not support the defendant's position. *Incalza* holds that it is not a conflict with IRCA for an employer to place an employee on unpaid leave while that employee's work authorization problems are remedied. *Id.* 1010-11.

> The court only examined conflict pre-emption and did not discuss field pre-emption. Defendant reasons that: "If Plaintiff's sweeping field preemption theory were correct, the *Incalza* Court would have had to strike down the state law at issue, as it would have constituted impermissible state regulation in a field occupied by Congress." (Doc. 219, Def.'s Br. at 83-84). We disagree. The court simply did not decide the field preemption issue. In fact, it noted that the parties did not argue the issue of field pre-emption, and conflict pre-emption was the only type of preemption at issue.

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As set forth in detail above, Congress has in fact enacted a comprehensive legislative scheme with regard to the employment of unauthorized aliens and occupies the field to the exclusion of state law. *See Abdullah v. American Airlines, Inc.*, 181 F.3d 363, 367 (3d Cir.1999) (finding implied field pre-emption with regard to air safety standards as the Federal Aviation Act and other federal regulations establish complete and thorough safety standards for interstate and international air transportation).[48]

Id. at 1010, n. 2. Defendant asserts that *Incalza* is "yet another example of a recent court holding recognizing that a state or local law designed to discourage illegal immigration is not preempted." *Id.* at 84. Defendant's interpretation of *Incalza* is incorrect. The ruling can more accurately be seen as providing more rights to aliens in that it holds that immediate termination is not required under IRCA when an alien is found to be unauthorized. Instead, an employee with a work authorization problem may be placed on unpaid leave until that issue is resolved.

[48] Defendant asserts that state courts have found IRCA does not preempt state laws. In support of this position defendant cites *Safeharbor Employer Servs. I, Inc. v. Cinto Velazquez*, 860 So.2d 984, 986 (Fla.App.2003). Defendant's reliance on *Safeharbor* is unconvincing. In that case, the District Court of Appeal of Florida held that the Florida Workers' Compensation Act allows benefits to illegal aliens, and IRCA does not preempt the award of such benefits. *Id.* at 986. *Safeharbor* does not address the issue of whether a state or municipality is pre-empted from enacting legislation addressing the issue of employment of unauthorized workers. Workers' compensation laws such as those addressed in *Safeharbor* deal with compensating workers injured on the job, not the hiring and employment of those aliens. *See also, Madeira v. Affordable Housing Foundation, Inc.*,

(Continued on following page)

ii. Conflict pre-emption

The final form of pre-emption is conflict pre-emption.[49] Conflict preemption exists where either (1) the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" or (2) it is "impossible for a . . . party to comply with both state and federal law." *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 899, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000).

IIRA and IRCA have similar purposes in that both address the employment of unauthorized aliens. For example, IRCA makes it unlawful "to hire, or to recruit or refer for a fee for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3)) with respect to such employment" or to hire for employment an

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469 F.3d 219 (2d Cir.2006) (finding that federal law did not pre-empt New York law that allowed injured undocumented workers to recover compensatory damages for lost earnings); *Correa v. Waymouth Farms, Inc.*, 664 N.W.2d 324, 329 (Minn.2003) (explaining that IRCA does not pre-empt state workers' compensation laws as it is not aimed at impairing existing state labor protections). Once again, however, defendant has cited a case that provides rights to illegal aliens, which is inconsistent with its overall theme that such individuals have no rights.

[49] The Supreme Court has explained that field pre-emption and conflict pre-emption are not "rigidly distinct." "Indeed, field pre-emption may be understood as a species of conflict pre-emption: a state law that falls within a pre-empted field conflicts with Congress' intent (either express or plainly implied) to exclude state regulation." *English v. General Elec. Co.*, 496 U.S. 72, 79 n. 5, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990).

individual without first complying with the act's verification requirements. 8 U.S.C. § 1324a(a)(1).

Likewise, IIRA provides: "It is unlawful for any business entity to recruit, hire for employment, or continue to employ, or to permit, dispatch, or instruct any person who is an unlawful worker to perform work in whole or part within the City [of Hazleton]." (IIRA § 4.A.)

Although the federal and local laws have a similar goal, the means to reach that goal are different. Under federal law, to establish that they are not hiring unauthorized workers, employers can utilize the I-9 Employment Eligibility Verification Form. 8 C.F.R. § 274a.2(a); *Getahun v. Office of Chief Administrative Hearing Officer,* 124 F.3d 591, 596 (3d Cir.1997). In addition to completing this form prospective employees must present documents to establish both their identity and their employment eligibility.[50] The employer must examine these documents to determine if they reasonably appear on their face to be genuine. 8 U.S.C. § 1324a(b)(1)(A)(ii).

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[50] Such documents include, *inter alia:* 1) a United States passport; 2) alien registration receipt card; 3) an unexpired foreign passport; and 4) an unexpired employment authorization document. 8 C.F.R. § 274a.2(b)(v)(A). *See also* 8 U.S.C. § 1324a(b)(1)(c). Additionally, the potential employees may establish their identities with, *inter alia,* 1) a driver's license; 2) a photographic school identification card; 3) a voter's registration card; and 4) a U.S. military card or draft record. 8 C.F.R. § 274a.2(b)(v)(B). *See also* 8 U.S.C. § 1324a(b)(1)(D).

Under the Hazleton Ordinance, an employer must collect from the employee "identification papers" and provide them to the Hazleton Code Enforcement Office.[51] The Code Enforcement Office then verifies with the federal government whether the employee is an unauthorized worker. (IIRA § 4.B.(3)). The primary conflict in this area is that under federal law, the employer has the responsibility to review the documents, and in the Hazleton Ordinance, the employer is required to present the documents to the Code Enforcement Office, which contacts the federal government to determine the status of the worker. The Hazleton Ordinance, therefore, supplements the requirements of federal law.

IIRA also conflicts with federal law in that under federal law, employers need not verify the immigrant status of certain categories of workers. For example, casual domestic workers and independent contractors are not covered by the federal requirements. 8 C.F.R. § 2741 a.1. IIRA contains no such exclusions.

IRCA prohibits employers from *knowingly* hiring or *knowingly* continuing to employ aliens who are unauthorized to work in America. *See* 8 U.S.C. § 1324a(a)(1)(A). Initially plaintiffs pointed out that IIRA does not require the element of knowledge. (IIRA § 4.A.). A last minute amendment during the trial of this matter added the element of knowledge to

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[51] IIRA does not specify which "identity documents" are required.

section 4.A. Nonetheless, IIRA still provides for strict liability, without the element of knowledge, with regard to the civil cause of action that it creates. *See* IIRA § 4.E. The federal IRCA statute does not create such a cause of action.

IIRA also conflicts with IRCA in its treatment of the Basic Pilot Program. "The Basic Pilot Program is a voluntary, experimental program created by Congress to permit employers to electronically verify workers' employment eligibility with the U.S. Dep. Of Homeland Security and the Social Security Administration." Note following 8 U.S.C. § 1324a. Under federal law, participation in the Basic Pilot Program is not mandatory. Under IIRA, participation in the Basic Pilot Program is at times mandatory. *See* IIRA § 4.C. (providing that all Hazleton city agencies must participate in the Basic Pilot Program); § 4.D. (requiring that all businesses that seek a City contract or grant must participate in the Basic Pilot Program).

Another conflict exists in the time frames utilized by each enactment. Under IRCA, an employee can contest a nonconformance (that is an initial finding that he is unauthorized to work) by the Basic Pilot Program within eight (8) days. 62 C.F.R. 48309(IV)(B)(2)(a). The Social Security Administration and federal immigration officials have ten (10) federal work days to respond. (*Id.*) The employer may not terminate the employee or take other adverse action against him based upon his employment eligibility status during this time period. (*Id.*). Under IIRA, no appeal right is provided to the employee,

and in fact, the employer must terminate the employee within three (3) business days. (IIRA § 4.B.3). Thus, in direct conflict with IRCA, Hazleton seeks to force an employer to terminate an employee where under federal law the employer is prohibited from terminating that employee. Additionally, under the Hazleton Ordinance, the only appeal right appears to be held by the employer who may toll the three (3) day termination period. (IIRA § 7.C.(2)). Without providing any appeal rights to the employee, IIRA is in conflict with the federal law.

Thus, this case is analogous to *Rogers v. Larson*, 563 F.2d 617 (3d Cir.1977). *Rogers* dealt with a Virgin Islands law relating to the admission and employment of nonimmigrant aliens. The law called for the termination of a nonimmigrant's employment if a qualified resident worker was available for the position. *Id.* at 619. Although federal law also addressed the employment of nonimmigrant aliens, the federal law provided more protection for the nonimmigrant aliens than the Virgin Islands law did. Nonimmigrant aliens challenged the law as federally preempted. The court noted that both the federal laws and the Virgin Island law had the same purposes of "assuring an adequate labor force . . . and to protect the jobs of citizens[.]" *Id.* at 626. However, in order to serve both these goals, "any statutory scheme . . . must inevitably strike a balance between the two goals." *Id.* In that case, as the Virgin Islands and the United States had struck the balance between the goals differently, the Virgin Islands' law amounted to "an obstacle to

the accomplishment and execution of the full purposes and objectives of the" federal law. *Id.*

Likewise in the instant case, although it appears that the goals of the two laws may be similar, a different balance between the rights of businesses and workers and the goal of preventing illegal employment is struck and IIRA ultimately ignores one of IRCA's main objectives. A bit of a background on immigration enforcement is helpful to understand this issue.

Under federal law there are two types of immigration enforcement: border enforcement, which is keeping unauthorized persons from entering the country; and interior enforcement, which is distinguishing between legal and undocumented immigrants already in the country and removing the latter. (N.T. 3/15/07 at 14). In interior enforcement, officials must strike a balance between finding and removing undocumented immigrants without accidentally removing immigrants and legal citizens, all without imposing too much of a burden on employers and workers. (*Id.* at 15). Too stringent of an enforcement system will result in the wrongful removal of United States citizens and legal immigrants. (*Id.*) United States foreign relations is affected by the manner in which the balance is struck. Excessive enforcement jeopardizes our alliances and cooperation with regard to matters such as immigration enforcement, drug interdiction and counter-terrorism investigations. (*Id.* at 16-17). Accordingly, the United States political system places the responsibility for

striking this balance with the United States Congress and the executive branch. (*Id.* at 15). In discussing the ordinances in the instant case, city council and the mayor did not consider the implications of the ordinances on foreign policy. (N.T. 3/14/07 at 87-89). Their only concern, as might be expected, was for Hazleton. (*Id.*)

Thus, IRCA and IIRA share a similar purpose: to prevent the employment of persons not authorized to work in the United State while not overburdening the employer in determining whether an employee or perspective employee is an authorized worker. The two laws, however, strike a different balance between these interests. The laws, therefore, conflict.

IRCA also seeks to prevent discrimination against legally admitted immigrants. The law makes it an unfair immigration-related employment practice to discriminate against a person with respect to hiring, recruitment or referral for a fee because of a person's national origin or because of an individual's citizenship status. 8 U.S.C. § 1324b. IIRA has no anti-discriminatory provisions, and this omission represents another conflict.

This case is also analogous to *Hines v. Davidowitz*, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941). In *Hines*, the Commonwealth of Pennsylvania enacted an Alien Registration Act, which required aliens 18 years of age or older to register once a year, provide certain information, pay a registration fee and receive an alien identification card that they had

to carry at all times. *Id.* at 56, 61 S.Ct. 399. The law further required aliens to present the identification card whenever demanded by a police officer or agent of the Department of Labor and Industry, and present the card before obtaining a driver's license or buying an automobile. *Id.* Violators of the act were subject to possible fines and imprisonment. *Id.* at 60, 61 S.Ct. 399. The federal government also had in effect an alien registration statute. This law required a single registration of aliens fourteen (14) years of age and older, certain information and fingerprinting. *Id.* at 60, 61 S.Ct. 399. It also provided for the secrecy of the federal files, and it did not require the aliens to carry a registration card or require them to exhibit it to the police or others. *Id.* 60-61, 61 S.Ct. 399. Violators of the act were subject to possible fines and imprisonment. *Id.* at 61, 61 S.Ct. 399.

The Pennsylvania law was challenged as precluded by the federal alien registration scheme. The Supreme Court held: "[W]here the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement the federal law, or enforce additional auxiliary regulations." *Id.* at 66, 61 S.Ct. 399. In finding that the law was unconstitutional, the Court noted: "And it is . . . of importance that this legislation deals with the rights, liberties and personal freedoms of human beings[.]" *Id.* at 68, 61 S.Ct. 399.

In support of its position that its Alien Registration Act was constitutional, Pennsylvania cited numerous cases where state legislation was upheld although it applied to aliens only. *Id.* at 69 n. 23, 61 S.Ct. 399. The Court noted, however, that in these cases Congress had not passed legislation on the subject of the various acts. *Id.*

In *Hines* as well as the instant case, however, Congress passed legislation aimed at the very issue addressed by the State or local law. Specifically, in this case, the federal government in exercising its superior authority in the field of immigration has enacted a complete scheme of regulation on the subject on the employment of unauthorized aliens. Hazleton cannot conflict, interfere, curtail or complement this law. As set forth above, Hazleton's Ordinance does conflict, interfere with and complement IRCA. It is therefore conflict pre-empted.

Defendant seems to argue that the law is constitutional because it is aimed at illegal aliens who have no right to be in the United States. Defendant's position fails to acknowledge that the law will affect more than illegal aliens. It will affect every employer, every employee who is challenged as an illegal alien and every prospective employee especially those who look or act as if they are foreign. As noted above, the Ordinance, unlike its superior federal counterpart, contains no antidiscrimination provisions.

The United States Supreme Court has noted: "Opposition to laws permitting invasion of the personal

liberties of law-abiding individuals, or singling out aliens as particularly dangerous and undesirable groups, is deep-seated in this country. Hostility to such legislation in America stems back to our colonial history[.]" *Id.* at 70, 61 S.Ct. 399. The Court further noted: "As early as 1641, in the Massachusetts 'Body of Liberties', we find the statement that 'Every person within this Jurisdiction, whether Inhabitant or foreigner, shall enjoy the same justice and law that is generally for the plantation * * * .'" *Id.* at 71 n. 27, 61 S.Ct. 399.

In conclusion, the employment provisions of IIRA differ from and conflict with IRCA. It is thus in violation of the Supremacy Clause of the United States Constitution.

2. Tenancy provisions

The Hazleton ordinances contain two sets of provisions affecting tenancy in the city. The first is a "harboring" provision of the IIRA that prohibits the housing of certain aliens. (IIRA §§ 5 and 7.B.) The second is the Tenant Registration Ordinance, (hereinafter "RO"), which requires all occupants of rental units to obtain an occupancy permit.[52] In order to

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[52] The official title of the ordinance is: "ORDINANCE 2006-13, ESTABLISHING A REGISTRATION PROGRAM FOR RESIDENTIAL RENTAL PROPERTIES; REQUIRING ALL OWNERS OF RESIDENTIAL RENTAL PROPERTIES TO DESIGNATE AN AGENT FOR SERVICE OF PROCESS; AND PRESCRIBING DUTIES OF OWNERS, AGENTS AND OCCUPANTS;

(Continued on following page)

receive such a permit, an applicant must provide "proof of legal citizenship and/or residency." (RO § 7.b.1.g). We will discuss the provisions of these two laws separat[illegible] and then analyze the pre-emption arguments.

a. Housing illegal aliens

Plaintiffs assert that the "harboring" portion of IIRA is conflict preempted because it is directly at odds with the federal immigration system. It prohibits landlords from "harboring" "illegal aliens." (IIRA § 5.A.) "Harboring" is defined as letting, leasing or renting a dwelling unit to an illegal alien or permitting the occupancy of a dwelling unit by an "illegal alien" knowingly or in reckless disregard of the fact that the alien has come to, entered or remains in the United States in violation of the law. (*Id.*).

Generally, IIRA provides a complaint procedure where a Hazleton official, business entity or resident can file a written complaint that a landlord is harboring an "illegal alien." (IIRA § 5.B.(1)). The Code Enforcement Office next obtains "identity data" from the owner regarding the tenant. (IIRA § 5.B.(3)). The Code Enforcement Office then consults with the

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DIRECTING THE DESIGNATION OF AGENTS; ESTABLISHING FEES FOR THE COSTS ASSOCIATED WITH THE REGISTRATION OF RENTAL PROPERTY; AND PRESCRIBING PENALTIES FOR VIOLATIONSR VIOLATIONS." (EX. A, DOC. 82-2).

federal government to determine the tenant's immigration status. If the verification reveals that the owner is in violation of the harboring provisions, he must correct the violation or face fines and suspension of his rental license. (IIRA § 5.B.(4) & § 5.B.(8)).[53]

b. Tenant Registration Ordinance

The second housing provision at issue, RO, requires, *inter alia*, that each person who seeks to occupy a rental dwelling obtain an "occupancy permit" from Hazleton.[54] In order to obtain a permit, a potential tenant must supply to the Code Enforcement Office "proper identification showing proof of legal citizenship and/or residency." (RO § 7.b.1.g). A landlord is prohibited from allowing occupancy of a rental unit unless all the occupants have obtained an occupancy permit. (RO § 7.b.).

If a landlord allows a tenant who does not have an occupancy permit to occupy a rental unit he faces a $1,000.00 fine "for each Occupant that does not have an occupancy permit and $100 per Occupant per day for each day that the Owner or Agent continues to allow each such Occupant to occupy the Rental Unit without an occupancy permit after Owner or Agent is given notice of such violation[.]" (RO § 10.b.).

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[53] The provisions of the harboring regulations are addressed more particularly below with respect to the due process issues.

[54] The permit costs ten dollars, but the fee is waived for those over age 65. (RO § 7.b.).

If a tenant has an occupancy permit, but he allows other occupants to reside at the premises who do not have permits, he is in violation of the ordinance and faces the same $1,000.00/$100 per occupant per day fine.[55] (RO § 10.b.).

Plaintiffs argue that the housing provisions of IIRA and RO are conflict pre-empted. As set forth above, a local ordinance is conflict preempted where either (1) the local ordinance "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" or (2) it is not possible to comply with both the federal and state law. *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 899, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000).

Plaintiffs assert that the IIRA and RO are in direct conflict with federal law because they are based upon the assumption that: 1) the federal government seeks the removal of all aliens who lack legal status and 2) "a conclusive determination by the federal government that an individual may not remain in the United States can somehow be obtained outside of a formal removal hearing." (Doc. 106, Pl. Br. at 11). After a careful review, we agree.

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[55] The city passed Ordinance 2006-35 subsequent to passing this ordinance. Ordinance 2006-35 has the same title as this "Tenant Registration" ordinance, but, it does not contain the occupancy permit requirements. Ordinance 2006-35 evidently did not repeal this ordinance, however, and was meant only to fill the gap with regard to registering residential rental properties while the "Tenant Registration" is challenged.

Initially, we note that it is completely within the discretion of the federal officials to remove persons from the country who are removable.[56] Indeed, the federal government permits several categories of persons who may not be technically lawfully present in the United States to work and presumably live here. For example, the following can receive permission from the federal government to work in the United States: 1) aliens who have completed an application for asylum or withholding of removal; 2) aliens who have filed an application for adjustment of status to lawful permanent resident; 3) aliens who have filed an application for suspension of deportation; 4) aliens paroled into the United States temporarily for emergency reasons or reasons deemed strictly in the public interest; 5) aliens who are granted deferred action "an act of administrative convenience to the government which gives some cases lower priority[.]" 8 C.F.R. § 274a.12(c) ¶¶ 8-11, 14. Additionally, aliens who have a final order of deportation against them but are released on an order of supervision may obtain permission to work. *Id.* ¶ 18; *see also* 8 C.F.R. § 274a.12(a) ¶¶ 11-13; 18-20, 22, 24) (listing more categories of aliens who may be violating immigration laws but may nonetheless

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[56] In fact at trial, Stephen Yale-Loehr, an expert in immigration law, testified that the federal government frequently exercises its discretion not to try to remove persons from the country even though they may lack lawful immigration status. (N.T. 3/19/2007 at 114, 127).

obtain permission to work in the United States by the federal government). In addition, aliens who have final orders of removal against them may be ordered released from detention by the courts if there is no likelihood of their removal in the foreseeable future. *See Zadvydas v. Davis*, 533 U.S. 678, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001). Although these aliens are permitted to work and implicitly to remain in the United States, they would be denied housing in Hazleton under the IIRA and RO. The ordinances thus conflict with federal law.

Furthermore, changing status from authorized to unauthorized is complex. For example, some individuals can affirmatively apply for regularization of status. In other instances, regularization of status is only available after an individual has been placed in removal proceedings by the federal government (even if the operative facts justifying relief predate the commencement of the removal hearing). (N.T. 3/19/07 at 118-121). It may take months or years for an applicant to adjust status, obtain relief or otherwise regularize status. (N.T. 3/19.97 at 128-129). Submitting an application does not change an individual's immigration status, even if the application is bona fide and will ultimately be approved. (N.T. 3/19/07 at 116-117). A person who is proceeding through the procedure to adjust his immigration status but who currently lacks immigration status frequently will not have any documents to indicate whether he has a

valid claim to remain in the country.[57] (N.T. 3/19/07 at 121).

The ordinances also conflict with federal law in that they assume that the federal government seeks the removal of all undocumented aliens. As the Supreme Court has noted: "An illegal entrant might be granted federal permission to continue to reside in this country, or even to become a citizen." *See, e.g.*, 8 U.S.C. §§ 1252, 1253(h), 1254 (1976 ed. and Supp.IV). *Plyler,* 457 U.S. at 226, 102 S.Ct. 2382. The United States government, however, determines whether to remove an alien only through formal procedures set forth in the Immigration and Nationality Act, 8 U.S.C. §§ 1101 *et seq.* and related regulations. Furthermore, the federal process provides procedural safeguards that include administrative appeal and judicial review. *See* 8 U.S.C. § 1229a; 8 C.F.R. 240, 1240.

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[57] For example, during the trial testimony indicated that during the 1990s Congress enacted an adjustment of immigration status referred to as "245(I)." This statute allowed certain persons in the United States illegally to pay a $1,000.00 penalty and then their status would be adjusted and they would receive a green card. Hundreds of thousands of individuals applied for relief under this enactment before it expired on April 30, 2001, but they have not yet all received their green cards. Technically, these people are removable from the country although once their applications are processed they will have a green card. N.T. 3/19/07 116-117. Immigration officials use their discretion not to remove these individuals with green card applications pending. N.T. 3/19/07 at 117. These individuals would not be allowed to live in Hazleton under its ordinances.

Even if an alien is deemed removable after removal proceedings, they may nonetheless be allowed to stay in the United States. For example, relief from removal may be obtained by spouses and other relatives of United States citizens, 8 U.S.C. § 1154; 8 U.S.C. § 1229b; victims of domestic violence, 8 U.S.C. § 1229b(b)(2); and those seeking protection from persecution or torture under the Convention Against Torture, 8 U.S.C. § 1231(b)(3); 8 C.F.R. §§ 208.16-18.

Additionally, under 8 U.S.C. 1229b, the United States Attorney General

> may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien –
>
> (1) has been an alien lawfully admitted for permanent residence for not less than 5 years,
>
> (2) has resided in the United States continuously for 7 years after having been admitted in any status, and
>
> (3) has not been convicted of any aggravated felony.

8 U.S.C. § 1229b.

Hence, the federal immigration rules and the decision whether an alien should be removed are very complex. More than resorting to the Basic Pilot Program or the Systematic Alien Verification for

Entitlements ("SAVE")[58] is necessary to determine if federal government seeks the removal of an individual from the United States.

As Supreme Court Justice Blackmun noted: "[T]he structure of the immigration statuses makes it impossible for the State to determine which aliens are entitled to residence, and which eventually will be deported." *Plyler,* 457 U.S. at 236, 102 S.Ct. 2382 (Blackmun, J., concurring). Additionally, Supreme Court Justice Lewis F. Powell stated: "Until an undocumented alien is ordered deported by the Federal Government, no State can be assured that the alien will not be found to have a federal permission to reside in the country." *Plyler,* 457 U.S. at 241 n. 6, 102 S.Ct. 2382 (Powell, J., concurring).

Hazleton's ordinances burden aliens more than federal law by prohibiting them from residing in the

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[58] SAVE "is an existing federal eligibility system used to verify status for various federal-state cooperative programs such as the Aid to Families with Dependent Children ('AFDC'), Food Stamps, Medicaid and Unemployment Compensation programs under which eligibility is dependent on lawful immigration status. *See* 42 U.S.C. § 1320b-7(b)(1) and 45 C.F.R. § 233.50 (AFDC); 42 U.S.C. §§ 1320b-7(b)(2) and 1396b(v)(1) (Medicaid); 7 U.S.C. § 2015(f) and 42 U.S.C. § 1320b-7(b)(4) (Food Stamps)." *League of United Latin American Citizens v. Wilson,* 908 F.Supp. 755, 770 (C.D.Cal.1995). Defendant's brief indicates that the United States Bureau of Citizenship and Immigration Services at the Department of Homeland Security confirmed with defendant's counsel that it intended to use SAVE when responding to verification requests regarding Hazleton tenants. (Doc. 87, Def. Br. At 28-29).

city although they may be permitted to remain in the United States. The ordinances are thus in conflict with federal law and pre-empted.

RO is additionally in conflict with federal law because it calls upon the employees of the Hazleton Code Enforcement Office to examine the paperwork of those seeking permits and determine if they are properly in the country. This procedure is in direct conflict with federal law. Immigration status can only be determined by an immigration judge. 8 U.S.C. § 1229a(a)(1) ("An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien."). Further, the proceeding before the immigration judge is the "**sole and exclusive procedure** for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States." 8 U.S.C. § 1229a(a)(3) (emphasis added).

Thus, for all the reasons set forth above, the housing provisions of the IIRA and the Tenant Registration Ordinance are preempted by federal law and are unconstitutional.

B. Procedural Due Process

Plaintiffs' second cause of action asserts that the ordinances at issue violate the procedural protections of the Due Process Clause found in the Fourteenth Amendment of the United States Constitution. (Compl.¶¶ 132-145). The Due Process Clause

prohibits a deprivation of "life, liberty or property" without due process of the law.

Plaintiffs assert that the ordinances at issue impinge on both their property and liberty interests and provide only illusory process. Defendant argues that the plaintiffs have no legitimate interest at stake, and regardless, the ordinances provide sufficient process. After a careful review, we agree with the plaintiffs. We will address first the interests that are at stake and then examine the process provided by the ordinances. Once again we will address the employment provisions and housing provisions of the ordinances separately.

1. Employment Provisions

a. Protected interest

In order to determine whether the protections of the due process clause apply, we must first determine whether the interests involved are encompassed in the Fourteenth Amendment's protection of liberty or property. *Baraka v. McGreevey,* 481 F.3d 187, 205 (3d Cir.2007). "'Liberty' and 'property' are broad and majestic terms. They are among the '(g)reat (constitutional) concepts . . . purposely left to gather meaning from experience . . . (T)hey relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.'" *National Mutual Ins. Co. v. Tidewater Transfer Co.,* 337 U.S. 582, 646, 69 S.Ct. 1173, 93 L.Ed. 1556 (1949) (Frankfurter J.,

dissenting) *quoted in The Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 571, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). The analysis of the interests asserted in the instant case is not overly complex; the appellate courts have already discussed interests similar to those asserted by the plaintiffs.

The employer plaintiffs, including the members of the Hazleton Hispanic Business Association, possess Fourteenth Amendment property and liberty interests in running their businesses. "[A] business is an established property right entitled to protection under the Fourteenth Amendment." *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 131 F.3d 353, 361 (3d Cir.1997). Additionally, the individual plaintiffs have an interest in their employment. The United States Supreme Court has explained that "the significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 543, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). The Court further noted: "While a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job." *Id.*

In a case dealing with an Arizona state statute that discriminated against aliens, the Court further noted: "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the

personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." *Truax v. Raich*, 239 U.S. 33, 41, 36 S.Ct. 7, 60 L.Ed. 131 (1915). These rights are both "liberty" and "property" rights. *Greene v. McElroy*, 360 U.S. 474, 492, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959) *cited in Piecknick v. Commonwealth of Pennsylvania*, 36 F.3d 1250, 1259 (3d Cir.1994). Defendant argues that employers have no right to enter into employee contracts with unauthorized workers; therefore, no protected interests are at stake. Defendant's argument is unconvincing. The argument presupposes that the Ordinance will affect only unauthorized workers. Actually, however, the IIRA affects all who are challenged under the law and all employers who have employees challenged.

Regardless, the Due Process Clause of the Fourteenth Amendment applies to all "'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Kamara v. Attorney General of U.S.*, 420 F.3d 202, 216 (3d Cir.2005) (quoting *Zadvydas v. Davis*, 533 U.S. 678, 693, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001)); *see also Plyler v. Doe*, 457 U.S. 202, 210, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982) ("Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments.").

As significant constitutional due process rights are at issue, the question then becomes whether the Ordinance provides sufficient procedural safeguards to protect these important interests. In other words, we now must determine whether the Ordinance provides process sufficient to satisfy the Fourteenth Amendment.

b. Process due

"The fundamental requirements of due process are notice and a meaningful opportunity to be heard, but the concept is flexible, calling for procedural protection as dictated by the particular circumstances." *Harris v. City of Philadelphia*, 47 F.3d 1333, 1338 (3d Cir.1995) (internal quotation marks and citation omitted). "'[D]ue process' is a flexible concept . . . the processes required by the Clause with respect to the termination of a protected interest will vary depending upon the importance attached to the interest and the particular circumstances under which the deprivation may occur." *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 320, 105 S.Ct. 3180, 87 L.Ed.2d 220 (1985).

Accordingly, we must examine the process available under the ordinances to determine whether adequate notice and hearing are provided. With regard to the employment provisions of the Ordinance, enforcement commences with the filing of a complaint alleging that a business entity employs unlawful worker(s) with the Hazleton Code Enforcement

Office. (IIRA § 4.B.(1)). A complaint can be filed by "any official, business entity, or City resident." *Id.* Next, the city determines if the complaint is valid. The Ordinance does not indicate how the validity of a complaint is determined, it merely states that a complaint alleging a violation based upon national origin, ethnicity, or race is invalid.[59] Once a complaint is deemed valid, the city obtains "identity information" within three days from the business entity and verifies with the federal government the immigration status of the challenged employee under 8 U.S.C. § 1373(c). (IIRA § 4.B.(3)). The term "identity information" is not defined in the Ordinance.

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[59] Robert Dougherty, Hazleton's Director of Planning and Public Works oversees the Code Enforcement Office, which includes the Rental Registration Office. (N.T. 3/16/07 at 39-40). As such, Dougherty is designated to oversee the implementation and enforcement of IIRA. (*Id.* at 48-49). Dougherty indicated that not all complaints will be deemed valid. *Id.* at 72. To be valid, the complaint must be in writing, have an address for the violation and the type of violation. It would have to be signed by the complainant and dated. *Id.* at 99. An investigatory process would be utilized to determine if the complaint was valid. *Id.* at 72, 99. Examples of an investigation include driving by the property and calling the complainant to obtain additional information. *Id.* at 99. He also testified that they would attempt to notify the tenant and employee that a complaint had been lodged. *Id.* at 110. Nothing in the Ordinance requires such notice or explains the investigation that the Dougherty intends to implement. As we are dealing with a facial challenge to the Ordinance and not an "as applied" challenge, we do not have to take into consideration the testimony of the manner in which the Code Enforcement Office intends to enforce the ordinances.

If the employer fails to provide the identity information within three (3) days, the Code Office must suspend the employer's business permit. (IIRA § 4.B.3). This suspension is mandatory and it is not dependent upon a finding that an "unlawful worker" has been hired.

If the employer fails to provide the identity information, and the challenge to the worker is that he is an unauthorized alien as defined in 8 U.S.C. § 1324a(h)(3), the Code Office must "submit the identity data required by the federal government to verify, pursuant to United States Code Title 8, section 1373, the immigration status of such person(s)[.]" 4.B.3. The Ordinance does not provide a procedure for such verification besides reference to 8 U.S.C. § 1373, which does not establish a verification mechanism. It merely requires the Immigration and Naturalization Service to respond to inquiries from federal, state and local government seeking the citizenship or immigration status of individuals.

Once the verification is completed, the Code Office provides the results to the employer. (IIRA § 4.B.3). If the employer is in violation of IIRA, it must correct the violation within three (3) business days. (IIRA § 4.B.4). Such correction includes either a) termination (or attempted termination) of the worker's employment; b) acquiring from the worker additional information and requesting a secondary or additional verification from the federal government of the worker's authorization. (IIRA § 7.C). If the employee challenges his termination in a Pennsylvania

court, the three (3) day period is tolled. (IIRA § 7.C.(3)).

If the employer fails to correct the violation within the required time frame, the Code Office must suspend the entity's business permit. (IIRA § 4.B.(4)). If, however, the business had previously used the federal government's "Basic Pilot Program" to verify the worker's status, the Code Office will not suspend the business's permit. (IIRA § 4.B.(5)).

If a business license is suspended, it can be restored in one business day after a sworn affidavit is provided stating that the violation ended. (IIRA § 4.B.(6)). The affidavit must provide the name, address and other "adequate identifying information" of the unlawful worker. (IIRA § 4.B.(6)(a)). If the appropriate authorities verify that the business entity employed two or more workers who are unlawful due to being "unauthorized aliens" as defined in 8 U.S.C. § 1324a, the business entity also must provide documentation that it has enrolled and will participate in the Basic Pilot Program. (IIRA § 4.B.(6)(b)). Where a business entity violates the Ordinance a second time or subsequent times, its business permit is suspended for twenty days by the Code Office. (IIRA § 4.B.(7)). The sole procedural protection provided to employees or employers under the Ordinance is to file an action "in the Magisterial District Court for the City of Hazleton, subject to the right of appeal to the Luzerne County Court of Common Pleas." (IIRA § 7.(F)).

Now that we have discussed the procedures available under IIRA, we must determine if they provide notice and an opportunity to be heard. We find that they do not.

As set forth above, notice is the cornerstone of due process. IIRA fails to require that anyone provide notice to an employee when a complaint is filed or at any time during the proceedings. In fact, when a complaint is filed, the employer could merely fire the employee and avoid the hassle of determining the employees immigration status. Nothing in IIRA provides protection to the employee from such action. Thus, it violates the fundamental principle of due process and is unconstitutional.

Additionally, when a complaint is filed, the Code Enforcement Office requires the employer to provide "identity information."[60] IIRA does not specify the nature of this information. Therefore, the employers are left not knowing what documents they need for the "hearing." The employer can request a second or additional verification, however, no such right is provided to the affected employee. Such notice, therefore, is inadequate.

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[60] Under federal law, when identity information is required, the law sets forth specifically what type of documentation is necessary. *See, e.g.*, 8 U.S.C. § 1324a(b)(1) (setting forth the documents that an employer must examine to verify that an individual is not an authorized alien).

The final level of "hearing" that both the employer and employee may use according to IIRA is resort to the Pennsylvania court system. The Pennsylvania courts, however, do not have the authority to determine an alien's immigration status. Federal law makes no provision for a state court to make a decision regarding immigration status. Such status can only be determined by an immigration judge. 8 U.S.C. § 1229a(a)(1) ("An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien."). Furthermore, the proceeding before the immigration judge is the "sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States." 8 U.S.C. § 1229a(a)(3).[61]

Thus, IIRA attempts to provide procedural protection to those affected by it by resorting to courts that do not have jurisdiction over determinations of immigration status. To refer those affected by IIRA to a court that cannot hear their claim is a violation of due process.

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[61] We note that for federal proceedings to determine the status of an alien, significantly more rights are provided to the alien. For example, an alien has the right to counsel, the right to a reasonable opportunity to examine the evidence against him, the right to present his own evidence, and the right to cross examine witnesses. 8 U.S.C. § 1229a(b)(4). These protections are considerably different from those provided by the ordinances, which do not even require that an alien be notified when a complaint is filed.

For the above reasons, we find that IIRA violates the due process rights of both the employers and employees and is thus unconstitutional.

2. Landlord/tenant provisions

a. Protected right

The other group of issues involve landlords and tenants. These individuals, like the employers and employees, possess interests protected by the Due Process Clause. According to the Supreme Court of the United States: "It cannot be disputed that tenants have a property interest in their apartments for the term of their lease." *Lindsey v. Normet*, 405 U.S. 56, 72, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972) (explaining that a "lease or rental agreement gives [a tenant] the right to peaceful and undisturbed possession of the property.").[62] As owners of the property, the landlords also have an interest in it as well as in an interest in the rights to income on the property. *Id.* at 72, 92 S.Ct. 862.

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[62] As Justice William O. Douglas noted: "Modern man's place of retreat for quiet and solace is the home. Whether rented or owned, it is his sanctuary. Being uprooted and put into the street is a traumatic experience." *Lindsey v. Normet*, 405 U.S. 56, 82, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972) (Douglas, dissenting in part).

b. Process due

As the landlords and tenants both have Fourteenth Amendment property interests, we must examine the process provided by IIRA to determine if sufficient process is provided.

Like the employment provisions, enforcement of IIRA commences upon the filing of a complaint with the Hazleton Code Enforcement Office that a landlord is harboring illegal aliens. (IIRA § 5.B.1). A complaint can be filed by "any official, business entity, or resident of the City." *Id.* If the complaint is considered valid – the Ordinance does not indicate how the validity of a complaint is determined, it merely states that a complaint alleges a violation based upon national original, ethnicity, or race is invalid – the city obtains identity information from the landlord and verifies with the federal government under 8 U.S.C. sec 1373(c), the immigration status of the person at issue.[63] The Code Enforcement Office then informs the landlord of the immigration status of the tenant. (IIRA § 5.B.(3)). If the tenant is an illegal

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[63] Section 1373 provides:

(c) Obligation to respond to inquiries

The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.

alien, the landlord then has five (5) days to "correct" the violation or his rental license is suspended. (IIRA § 5.B.(4)). Corrections can be made as follows: 1) eviction of the tenant; 2) the landlord may collect additional information from the alien and request a second or additional verification under 8 U.S.C. sec 1373(c); or 3) the landlord may commence action against the tenant for recovery or possession of the property. (IIRA § 7.D.).

If unsatisfied with the results of the process provided, either the tenant or landlord may bring an action in the Magisterial District Court for the City of Hazleton, with a right to appeal to the Luzerne County Pennsylvania Court of Common Pleas. (IIRA § 7.F.).

Now that we have discussed the procedures available under the Ordinance, we must determine if they provide notice and an opportunity to be heard. For the same reasons discussed above with regard to the employment provisions, we find that procedures provided in the Ordinance are not sufficient to satisfy the requirements of due process.

First and foremost, the Ordinance does not provide any notice whatsoever to a tenant who is the subject of a challenge. An ordinance which could cause people to lose their residences but provides them no notice before eviction certainly does not meet

the requirements of due process.[64] Thus, the determination can be made without the challenged individual's participation at all.

Additionally, the statute that the defendant relies upon for the proposition that the federal government must reply to their inquiry with regard to immigration status, 8 U.S.C. § 1373, does not state the nature of the "identity data" that is needed to verify the tenant's immigration status. Therefore, the owners are left not knowing what documents they need for the "hearing." To provide for a hearing for which an interested party cannot adequately prepare is a violation of due process.

The owner/landlord can request a second or additional verification, however, no such right is provided to the affected tenant. (IIRA § 7.D.(2).

The final level of "hearing" that both the tenant and owner/landlord may use is resort to the Pennsylvania court system -- this is actually the first level of review provided to the tenant. However, as set forth more fully above, the Pennsylvania courts do not have the authority to determine an alien's immigration status. Such status can only be determined by an immigration judge. Once again, the IIRA seeks to

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[64] The IIRA is silent as to the process the city engages in to obtain "identity data" after a complaint has been filed. Evidently, the Code Enforcement Office obtains the information from the owner of the property and has no dealings at all with the challenged tenant. (IIRA § 5.B.3).

provide a remedy in a court that lacks jurisdiction. This procedure does not comport with the requirements of due process.

Because the IIRA does not provide notice to challenged employees or tenants, does not inform the employers and owners/landlords of the types of identity information needed, and provides for judicial review in a court system that lacks jurisdiction, it violates the due process rights of employers, employees, tenants and owners/landlords. It is therefore unconstitutional.

C. Equal Protection

Plaintiffs' third cause of action claims that IIRA violates the Equal Protection Clause of the Fourteenth Amendment by allowing the City to consider race, ethnicity or national origin in determining whether a complaint under the Ordinance is "valid." (Compl.¶¶ 146-155). Even though defendant amended IIRA to remove language that plaintiffs argued gave explicit sanction to racial classification, plaintiffs continue to insist that IIRA violates their right to equal protection of the laws. Defendant argues that IIRA implicates neither a fundamental right or a suspect class, and therefore must be judged by the most deferential form of scrutiny. Under this form of scrutiny, defendant contends, IIRA does not violate plaintiffs' right to equal protection.

The Fourteenth Amendment to the United States Constitution declares that a State may not "deny to

any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV § 1. When a plaintiff challenges a policy established by the government, the key question becomes the level of scrutiny to apply to that policy. For policies that implicate a fundamental right or use "[s]uspect classifications, such as those based on race, national origin, or alienage" the "'most exacting scrutiny'" applies. *United States v. Williams,* 124 F.3d 411, 422 (3d Cir.1997) (quoting *Clark v. Jeter,* 486 U.S. 456, 461, 108 S.Ct. 1910, 100 L.Ed.2d 465 (1988)); *see also Loving v. Virginia,* 388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) (invalidating a state anti-miscegenation law on equal protection grounds in part because "the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."). The United States Supreme Court has called this type of examination "'strict scrutiny.'" *Grutter v. Bollinger,* 539 U.S. 306, 326, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003) (quoting *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995)). "This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests." *Id.* Courts use this level of scrutiny "to 'smoke out' illegitimate uses of race [or other suspect classifications] by assuring that [the government] is pursuing a goal important enough to warrant use of a highly suspect tool.'" *Id.* (quoting *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 493, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989)). If, however, no suspect class or

fundamental right and no classification based on sex is involved, "the statute must be sustained if it bears a rational relationship to a legitimate state interest." *Kranson v. Valley Crest Nursing Home*, 755 F.2d 46, 53 (3d Cir.1985).[65]

In their complaint and pre-trial briefing, plaintiffs argued that the City's scheme for enforcing IIRA, where the City responded to complaints from the public about improper hiring or housing of immigrants, violated equal protection rights. This system required the City's Code Enforcement Office to seek identity information from landlords and employers whenever a City resident, official or business entity submitted a "valid" complaint. Ordinance 2006-18 at §§ 4.B.1, 4.B.3. IIRA also declared that "[a] complaint which alleges a violation solely or primarily on the basis of national origin, ethnicity, or race shall be deemed invalid and shall not be enforced." *Id.* at § 4.B.2. Plaintiffs contended that this language allowed the City to consider race, ethnicity or national origin in enforcing IIRA, and that the policy therefore implicated a suspect classification. They argued that the City had articulated no compelling state interest for the policy, and that the court must therefore find that IIRA violates Equal Protection.

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[65] Defendant refers to this level of scrutiny as "minimal scrutiny." We prefer the term "rational basis" as it derives from the court cases that established the test, better describes the legal standard and does less to imply the outcome of the inquiry.

As set forth above, the City has amended IIRA since the plaintiffs filed their second amended complaint. As presently amended, the Ordinance holds invalid "[a] complaint which alleges a violation on the basis of national origin, ethnicity, or race." In informing the court of this amendment, Hazleton's trial counsel argued that the City had made this change "in an effort to simplify this issue and remove the equal protection challenge" from the case. (N.T. 3/12/07 at 52).[66] We have already determined that we should evaluate the latest version of the statute, and will do so here. *See supra*, section C.

Plaintiffs argue that the latest version of IIRA violates equal protection, even though the City removed language that required enforcement on the basis of race, ethnicity or national origin. They have apparently shifted their emphasis from a focus on the language of the policy itself to an inquiry into the defendant's intent in amending IIRA. This approach requires a slightly different analysis. The equal protection "clause prohibits states from intentionally discriminating between individuals on the basis of race." *Antonelli v. New Jersey*, 419 F.3d 267, 274 (3d Cir.2005)). "To prove intentional discrimination by a

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[66] Hazleton's counsel declared that the City Council would meet on "Thursday, March 15th, to take out the three words that the Plaintiffs object to and have objected to continuously for page after page in all of their briefs. Those are the words solely or primarily found in Section 4B2 and 5B2 of the ordinance . . . We are doing this to try to remove the issue, to try to accommodate the Plaintiffs." (N.T. 3/12/07 at 52).

facially neutral policy, a plaintiff must show that the relevant decisionmaker (e.g., a state legislature) adopted the policy at issue 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Pryor v. National Collegiate Athletic Ass'n*, 288 F.3d 548, 562 (3d Cir.2002) (quoting *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979). Further, "[a] mere awareness of the consequences of an otherwise neutral policy will not suffice." *Id.* "Even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose." *Pers. Administrator*, 442 U.S. at 272, 99 S.Ct. 2282. A party can demonstrate this "intentional discrimination" by, in relevant part, demonstrating that "a facially neutral law or policy that is applied evenhandedly is motivated by discriminatory intent and has a racially discriminatory impact." *Antonelli v. New Jersey*, 419 F.3d 267, 274 (3d Cir.2005).

Plaintiffs point to the testimony of immigration expert Marc Rosenblum, Ph.D., to argue that IIRA will "exacerbate the phenomenon of 'defensive hiring,'" the practice by which employers choose not to hire individuals who "'might be illegal.'" (N.T. 3/15/07 at 48). A similar problem, he found, would exist for landlords in the same situation. (*Id.* at 52). Dr. Rosenblum also argued that employers and landlords, facing steep fines and only limited process to protect their rights, would probably choose to end a

relationship with anyone accused of illegal status, whether that accusation was warranted or not. (*Id.* at 59-60). Plaintiffs contend that these actions would more likely affect Latinos than members of other groups, since employers and landlords would utilize an "'informational shortcut'" and operate on the assumption that illegal aliens are most likely Latinos. (*Id.* at 61). The City was aware of this testimony about the likely discriminatory effect of IIRA when it passed the amended version of it, plaintiff points out, yet did nothing to address the discrimination that would likely result. This failure to act in the face of knowledge of likely discrimination, plaintiffs argue, should lead the court to conclude that plaintiffs intended to discriminate with their revised IIRA.

Plaintiffs cannot demonstrate discriminatory intent in passing the amended IIRA. They point to the testimony of Hazleton's mayor and the actions of its council as evidence of a discriminatory intent. At trial, plaintiffs' attorney asked Louis Barletta, the mayor of Hazleton, whether he would "reconsider" the ordinances if evidence appeared that they would have a "discriminatory effect." (N.T. 3/15/07 at 263). The mayor responded that he did "not believe that it will have a discriminatory effect," but would in fact "have the opposite" impact. (*Id.*). When asked if he would repeal the ordinances if evidence indicated that they would have a discriminatory effect, the mayor responded that "I believe if the ordinances are legal, I believe we have the right to enforce them. As long as they're legal, that is my concern." (*Id.*). When asked if

he would enforce the ordinances if they were declared legal but had a discriminatory effect, the mayor declared that "if they were legal, and I believe they had a discriminatory effect, I would not present it. If they are legal, and I believe they do not have a discriminatory effect, I would pass the ordinance." (*Id.*). An opinion that the ordinances were legal from a court, despite a finding by experts that they were likely discriminatory, would not cause the mayor to change his resolve to enforce the ordinances, since "[e]ven experts have their own biases and opinions." (*Id.* at 264). Defendant also apparently passed the amendments more quickly than is usually the case for such legislation, foregoing second and third readings of the statute.

We do not find that the mayor's testimony or his knowledge of Dr. Rosenblum's testimony about the potential impact of the ordinances demonstrates a discriminatory intent on the part of the mayor sufficient to find IIRA, even with its changed language, violates equal protection. "Discriminatory intent 'implies that the decision-maker . . . selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.'" *Antonelli,* at 419 F.3d at 274 (quoting *Personnel Adm'r,* 442 U.S. at 279, 99 S.Ct. 2282). At worst, Mayor Barletta testified to an intention to enforce IIRA when a court declared it legal, and he perhaps admitted that he had been aware that the ordinances potentially had a discriminatory effect. He did not testify that his desire was

to discriminate or that he urged the City to amend the ordinances out of a desire to obscure its illegal intent. No evidence indicates that Mayor Barletta approved of the ordinances because of their potential discriminatory impact. Similarly, the mere fact that the defendant, in the face of litigation, amended IIRA outside of the usual procedure followed by the City Council does not constitute evidence of a discriminatory intents.[67] Instead, the Council appeared to have acted on the advice of counsel to eliminate provisions in the original ordinance that could lead to a declaration of unconstitutionality. Plaintiffs offer no evidence that this change was designed to mask a discriminatory motive. Plaintiffs therefore have not presented

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[67] Plaintiffs point to *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) to argue that a departure from a city's normal procedures could be evidence of a discriminatory intent. The court in *Arlington Heights* did find that "[d]epartures from the normal procedural sequence also might afford evidence that improper purposes are playing a role." *Id.* at 267, 97 S.Ct. 555. In providing examples of how changes to normal procedures or policies could be evidence of discrimination, the Court cited cases where cities or municipal bodies changed policies to prevent development that threatened to promote integration. *See id.* at n. 16 and n. 17, 97 S.Ct. 555. The court did not define what would constitute an "improper departure from a normal procedural sequence." *Id.* at 267, 97 S.Ct. 555. In distinction from the cases cited by the court (and the *Arlington Heights* case itself), however, the City Council in Hazleton did not depart from procedure by refusing to provide permits normally granted to applicants. Instead, the council rushed through an amendment to the Ordinance in an attempt to save that Ordinance from being found in violation of the United States Constitution.

evidence that the ordinances, despite their facially neutral form, were motivated by a discriminatory purpose. No equal protection violation exists on those grounds.

As another ground for an equal protection challenge, plaintiffs have argued that IIRA improperly allows the City to consider race, ethnicity or national origin in enforcing it. As currently written, the ordinances do not implicate a fundamental right or use a suspect classification. IIRA's enforcement provisions are now facially neutral, since they declare that no complaint that uses race, ethnicity or national origin will be enforced. The plaintiffs also do not contend that they implicate a fundamental right, such as marriage. We need not examine the policy using strict scrutiny. Accordingly, our equal protection analysis must only explore whether IIRA has "a rational relationship to a legitimate state interest." *Kranson,* 755 F.2d at 53. We agree with the defendant that the ordinances meet this standard. As its interest in passing this legislation, the City claims that it was motivated by a desire to protect public safety by limiting the crimes committed by illegal immigrants in the city and to safeguard community resources expended on policing, education and health care.[68]

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[68] Testimony at trial indicated that funding for hospitals and schools in Hazleton did not come from the budget of the City of Hazleton. This evidence indicates that Hazleton has overstated the direct cost to the city of the presence of undocumented aliens in town. Nevertheless, we find that many costs for both the City and City residents can be associated with the increased

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The City presented evidence that some crimes were committed by illegal aliens.[69] Assuming that the City has the right to regulate the presence of illegal aliens in the city, the City program that provides penalties for those who employ or provide housing for undocumented persons in the City is rationally related to the aim of limiting the social and public safety problems caused by the presence of people without legal authorization in the City. We therefore find that Ordinance 2006-18, as amended, does not on its face violate the plaintiffs' right to the equal protection of the laws.

D. Privacy Rights

Plaintiffs' eighth cause of action claims IIRA and RO violate their right to privacy as protected in the United States and Pennsylvania Constitutions. (Compl.¶¶ 200-212).

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population, particularly when those residents are undocumented workers who present special problems of communication and government-resident interaction.

[69] Certain testimony at trial concerned violated crimes committed by illegal aliens in Hazleton. The City cited these crimes as the reason for passing its ordinances. The plaintiffs disputed the connection between illegal immigration and crime in Hazleton, arguing that the crime rate had actually decreased during the years when increasing numbers of immigrants moved to the City. Our disposition of this matter focuses on legal issues that do not require us to resolve this dispute. For our analysis on the issue of equal protection, it is sufficient for us to find that the City identified serious crimes committed by illegal aliens as a problem.

The City's Tenant Registration Ordinance mandates the collection of certain information from those who seek authorization to dwell in rental properties. The Ordinance requires "all Occupants" of rental properties to "obtain an occupancy permit." Ordinance 2006-13 at § 7.b. An applicant for such a permit must supply several pieces of information: "a) Name of Occupant; b) Mailing address of Occupant; c) Street address of Rental Unit for which Occupant is applying, if different from mailing address; d) Name of Landlord; e) Date of lease commencement; f) Proof of age if claiming exemption from the permit fee; g) Proper identification showing proof of legal citizenship and/or residency." *Id.* at § 7.b.1(a-g).

IIRA does not define what constitutes "proper identification showing proof of legal citizenship and/or residency." *Id.* at § 7.b.1.g. RO promises to keep the information "collected by the City . . . confidential." Ordinance 2006-13 § 12. That information "shall not be disseminated or released to any individual, group or organization for any purpose except as provided herein or required by law." *Id.* That "[i]nformation may be released only to authorized individuals when required during the course of an official City, state or federal investigation or inquiry." *Id.*

IIRA also requires that the City collect information about the identity of various persons. Under section 4 of IIRA, which deals with "Business Permits, Contracts, or Grants," the Hazleton Code Enforcement Office is required, upon receipt of a "valid complaint," to "request identity information from the

business entity regarding any persons alleged to be unlawful workers." Ordinance 2006-18 at § 4.B.3. If the unlawful worker cited in the valid complaint is alleged to be an "unauthorized alien, as defined in United States Code Title 8, subsection 1324(a)(h)(3),"[70] the Code enforcement office is required to "submit identity data required by the federal government to verify, pursuant to United States Code Title 8, section 1373, the immigration status of such person(s)[.]"[71]

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[70] That section of the United States Code defines an unauthorized alien as "an alien [who is] not . . . either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this Act or by the Attorney General."

[71] Title 8 section 1373 of the United States Code reads:

"(a) In general. Notwithstanding any other provision of Federal, State or local law, a Federal, State or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

(b) Additional authority of government entities. Notwithstanding any other provision of Federal, State or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:

(1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.

(2) Maintaining such information.

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The "harboring" provision of IIRA requires owners to provide the Code Enforcement Office with "identity data needed to obtain a federal verification of immigration status" within three days of receiving written notice of a complaint to avoid penalties. Ordinance 2006-18 § 5.A.3. A separate provision of the Ordinance specifies that the Code Enforcement Office will "submit identity data required by the federal government to verify immigration status," but that the

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(3) Exchanging such information with any other Federal, State, or local government entity.

(c) Obligation to respond to inquiries. The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information." We presume that the Ordinance, in declaring that the Code Enforcement Office will "submit identity data required by the federal government to verify" a workers' status, intends to establish that the Office will provide whatever information the government requests. The Ordinance does not, however, explain what information might be required. We note that 8 U.S.C. § 1324a(b)(1)(C)(i-ii) describes the "(d)ocuments evidencing employment authorization" as "(i) social security account number card (other than such a card which specifies on the face that the issuance of the card does not authorize employment in the United States); or (ii) other documentation evidencing authorization of employment in the United States which the Attorney General finds, by regulation, to be acceptable for purposes of this section." 8 U.S.C. § 1324a(b)(1)(C)(i-ii).

Office will "forward identity data provided by the owner to the federal government." *Id.* at § 5.B.3.

Courts have recognized two areas of privacy rights: "'one is in the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.'" *United States of America v. Westinghouse Electric Corp.*, 638 F.2d 570, 577 (3d Cir.1980). This case falls into the first of those categories. "There is no absolute protection against disclosure" of such confidential information. *Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia,* 812 F.2d 105, 110 (3d Cir.1987). When a court evaluates "right to privacy claims, we . . . balance a possible and responsible government interest in disclosure against the individual's privacy interests." *Sterling v. Borough of Minersville,* 232 F.3d 190, 195 (3d Cir.2000). Courts have concluded that "in performing the necessary balancing inquiry . . . 'the more intimate or personal the information, the more justified is the expectation that it will not be subject to public scrutiny.'" *Id.* (quoting *Fraternal Order of Police*, 812 F.2d at 118). Further, in considering whether private information should be disclosed, a court weighs seven factors: "(1) the type of record requested; (2) the information it does or might contain; (3) the potential for harm in any subsequent nonconsensual disclosure; (4) the injury from disclosure to the relationship in which the record was generated; (5) the adequacy of safeguards to prevent unauthorized disclosure; (6) the degree of need for

access; and (7) whether there is an express statutory mandate, articulated public policy, or other recognizable interest favoring access." *Doe v. Southeastern Pennsylvania Transportation Authority*, 72 F.3d 1133, 1140 (3d Cir.1995) (citing *United States v. Westinghouse Electric Corp.*, 638 F.2d 570, 578 (3d Cir.1980)).

For reasons that will become apparent, we will address only the question of whether the ordinances implicate private information.

The Records Requested

Hazleton's ordinances do not explain with precision which documents are required to complete a valid tenant registration, answer a valid complaint about an illegal worker, or meet the requirements of IIRA's harboring provisions. The ordinances require only that an applicant under RO provide "proper identification showing proof of legal citizenship and/or residency." Ordinance 2006-18 at § 7.b.1.g. In its brief, defendant contends that the information required by the Ordinance would "[include]: name, address, telephone number, date of birth and proof of citizenship (passport, birth certificate or naturalization document), or in the case of aliens, documentation of status (documentation of lawful permanent residency or 'green card,' nonimmigrant visa, or other

relevant document issued by the federal government)."[72]

IIRA is even less clear on what records will be required of businesses and landlords attempting to refute the charges contained in a valid complaint. Business owners charged with employing an unlawful worker are required to "submit identity data required by the federal government to verify, pursuant to United States Code Title 8, section 1373, the immigration status of such person(s)[.]" Ordinance 2006-18 § 4.B.3. Landlords charged with "harboring" illegal aliens must supply the City with "identity data needed to obtain a federal verification of immigration status." *Id.* at § 5.A.3.

We are left to conclude that the ordinances are too vague for us to determine on their face exactly what documents renters, employers and landlords must submit in order to comply. Testimony at trial did not clarify this matter. The ordinances do not require the presentation of any specific documents, and even the sections of the immigration statute that the ordinances cite do not provide a list of documents the

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[72] We note that none of these documents are mentioned in the ordinances. Since we must judge the ordinances on their face, and not how defendant claims the ordinances will be implemented, we cannot accept defendant's version of the meaning of "proper identification showing proof of legal citizenship and/or residency." We are also unsure what constitutes other "relevant document[s] issued by the federal government" to establish a legal right to reside in the United States.

government would use to answer the City's request for a verification of status. *See* 8 U.S.C. § 1373(c). Without a clearer statement of the documents required from those seeking rental permits or fighting off complaints under IIRA, we cannot determine the discrete types of documents at issue in this case.

We find that we lack adequate information to balance the plaintiffs' privacy interest in the data requested with the City's need for that information. Neither party has presented sufficient evidence of what type of information will be required from plaintiffs, and plaintiffs have not adduced case law that would allow us to conclude that immigration information is on its face private data. We will therefore dismiss the plaintiffs' privacy rights complaint.

III. FEDERAL STATUTORY CAUSES OF ACTION

In addition to federal constitutional claims, plaintiffs' complaint raises issues with regard to the federal Fair Housing Act and 42 U.S.C. § 1981. We now turn our attention to these issues.

A. Fair Housing Act

The plaintiff's fourth cause of action asserts that the ordinances violate the federal Fair Housing Act (hereinafter "FHA"), 42 U.S.C. §§ 3601 *et seq.* (Second Am. Compl. ¶¶ 157-164.) The FHA prohibits discrimination in residential real estate-related transactions

on the basis of "race . . . or national origin." 42 U.S.C. § 3604(a). Plaintiffs assert that the Defendant's ordinances discriminate based upon race and national origin in violation of the FHA. (Second Am. Compl. ¶ 163).

Plaintiffs challenge the harboring provisions of the IIRA under the FHA. At the time that plaintiffs filed the Second Amended Complaint, these provisions provided: "A complaint which alleges a violation **solely or primarily** on the basis of national origin, ethnicity, or race shall be deemed invalid and shall not be enforced." (IIRA § 5.B.2) (emphasis added). Plaintiffs' position is that the wording of the Ordinance allows national origin and race to be relied upon, in part, for a complaint, therefore, the Ordinance violates the FHA.

Plaintiffs also challenge Hazleton's Tenant Registration Ordinance under the FHA. The Tenant Registration Ordinance requires tenants to show proof of lawful immigration in order to obtain an occupancy permit. (Ordinance 2006-13). This ordinance, however, does not contain a prohibition against discrimination by housing providers. Plaintiffs assert that because the ordinance fails to prohibit discrimination, minority housing seekers will suffer an adverse disparate impact in obtaining housing. In other words, plaintiffs assert that the Tenant Registration Ordinance will be discriminatory in its effect.

We find that plaintiffs' challenge to these ordinances based upon the FHA is without merit. The

defendant amended the IIRA in March 2007, and the Ordinance now reads: "A complaint which alleges a violation on the basis of national origin, ethnicity or race shall be deemed invalid and shall not be enforced." (Def.Ex.251, Ord.2007-7). As the defendant removed the offending language from the Ordinance, plaintiffs now argue that, like the Tenant Registration Ordinance, the IIRA will be discriminatory in effect.

Plaintiffs cite the testimony of Dr. Rosenblum that the ordinances are likely to increase discrimination in housing, particularly against those of Latino descent. (*See, e.g., Vol.* 4/21:5-12; 47:17-48:20). We are unconvinced by plaintiffs' argument.

Plaintiffs present a facial challenge to the ordinances, not an "as applied" challenge.[73] Therefore, we must determine whether the statutes, as written, could not be read to conform to the law. *See United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) (holding that "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."); *Belitskus v. Pizzingrilli*, 343 F.3d 632, 648 n. 10 (3d Cir.2003) (holding that "[i]n order to successfully prosecute such a challenge, plaintiffs would have to

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[73] Plaintiffs could not bring an "as-applied" challenge as the ordinances have not yet been applied.

establish that no set of circumstances exist under which mandatory filing fees are valid."). In any case, because the statutes have not yet gone into effect, we cannot know whether they would have the discriminatory effect that plaintiffs claim. We therefore cannot find a Fair Housing Act violation based on Professor Rosenbaum's testimony on the predicted effects of the ordinances.

B. Section 1981

The Fifth Cause of Action found in plaintiffs' complaint asserts a violation of 42 U.S.C. § 1981 (hereinafter "section 1981"). (Compl.¶ 165-172). Section 1981 provides that "all persons" shall, *inter alia*, have the same right to make and enforce contracts and have the full and equal benefit of all laws to the same extent enjoyed by "white citizens."[74]

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[74] Section 1981 provides:

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance,

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Plaintiffs' position is that section 1981 prohibits discrimination based upon alienage and race and that the Ordinance violates this prohibition. More particularly, the plaintiffs claim that defendant violates § 1981 by making it impossible for unauthorized aliens to enter into lease agreements due to the Tenant Registration Ordinance and the housing portions of the IIRA. Defendant asserts that illegal aliens are not persons under section 1981 and therefore, they are not afforded its protections. We disagree with the defendant.

Generally, an alien is a "person" as that term is used under section 1981. *Takahashi v. Fish and Game Comm'n*, 334 U.S. 410, 419, 68 S.Ct. 1138, 92 L.Ed. 1478 (1948), *see also Graham v. Richardson*, 403 U.S. 365, 377, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971) ("The protection of this statute has been held to extend to aliens as well as to citizens."). The Supreme Court, however, has not yet addressed whether the protections of section 1981 extend to undocumented aliens, i.e. whether an undocumented alien is a "person" under section 1981. The Court has, in the context of the Fourteenth Amendment, held that

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modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

"[w]hatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." *Plyler*, 457 U.S. at 210, 102 S.Ct. 2382. This reasoning applies equally to a section 1981 analysis as to the Fourteenth Amendment analysis, especially because the language used in section 1981 is based in part on the language of the Fourteenth Amendment. *Takahashi*, 334 U.S. at 420, 68 S.Ct. 1138. Accordingly, we find that aliens, regardless of their status under the immigration laws, are persons under section 1981.

Defendant contends that section 1981 is not commensurate with the Fourteenth Amendment. We agree, but that does not alter our analysis. Plaintiffs do not argue that section 1981 is commensurate with the Fourteenth Amendment, but rather that the definition of "person" found in section 1981 should be construed to include undocumented workers just as the same term has been construed under the Fourteenth Amendment. Therefore, the cases that defendant cites to establish that gender discrimination, religious discrimination, national origin discrimination and age discrimination are not covered by section 1981 are not persuasive.

Further, defendant argues that to find that undocumented aliens have rights under section 1981 would be inconsistent with Congress's intent of prohibiting employment of such persons as evidenced

by the passage of IRCA. This argument is unconvincing.

When Congress passes two laws which conflict, the more recent law can be viewed as a implied repeal of the earlier act in order to bring it in line with the newer law. *Posadas v. Nat'l City Bank of New York,* 296 U.S. 497, 503, 56 S.Ct. 349, 80 L.Ed. 351 (1936) (explaining that when two statutes "are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one.") *quoted in Tineo v. Ashcroft,* 350 F.3d 382, 391 (3d Cir.2003). Thus, as the more recent of the laws, IRCA can be viewed as an implied repeal of the earlier statute to the extent of any conflict. The conflict that we are presented with is that section 1981 provides that undocumented aliens have the same right to contract as "white citizens." IRCA provides that unauthorized aliens do not have the right to enter into employment contracts.[75] IRCA works as a repeal of section 1981 to the extent that section 1981 would allow unauthorized workers to enter into employment contracts. Otherwise, the unauthorized workers have the same right to contract as other citizens.

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[75] IRCA involves the employment of unauthorized workers. It does not mention other types of contracts including contracts to provide housing. Further, as discussed above with regard to pre-emption, the federal government allows certain aliens to work in the United States and implicitly to live here. To forbid these individuals from entering into housing contracts would be inconsistent with their being allowed to remain in the country.

Accordingly, section 1981 forbids the defendant from prohibiting undocumented aliens from entering into leases. Thus, the Tenant Registration Ordinance and the housing provisions of the IIRA, which forbid such contracts, are in violation of section 1981.

IV. STATE LAW CAUSES OF ACTION

The final causes of action we need to address are plaintiffs' state law claims. Plaintiffs assert that the ordinances violate the Pennsylvania Home Rule Charter Law and the Pennsylvania Landlord and Tenant Act. In addition, plaintiffs assert that in enacting the ordinances defendant exceeded its legitimate police powers. We will address these issues *in seriatim*.

A. Pennsylvania Municipality Law

Plaintiffs' sixth cause of action argues that the employment provisions of IIRA violate Pennsylvania municipality law. (Compl.¶¶ 174-186). The City limits the conditions under which an employer may discharge an employee and provides discharged employees with a cause of action. Plaintiffs contend that Hazleton has added conditions to the terms of employment in the city in violation of the Third-Class City Code.[76] Since Pennsylvania is an at-will

[76] In their briefs, the parties disagree over whether Hazleton is a Home-Rule Charter City or a municipality organized under some other plan. (See Doc. 87 at 76, Doc. 82 at ¶ 174; Doc.

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employment state, Hazleton may not add conditions to employment through an anti-illegal immigration ordinance. Defendant argues that plaintiffs have not demonstrated that IIRA violates any particular provision of Pennsylvania law or the Pennsylvania Constitution, and that nothing in IIRA is contrary to such law. In addition, defendant argues that Pennsylvania law does not prohibit IIRA's restrictions on employment based on immigration status. Such restricts, defendant contends, already exist in provisions of federal law that prohibit businesses from knowingly employing workers without proper documentation. In addition, "at will" employment does not preclude a worker from filing suit for wrongful discharge, and defendant merely provides a private cause of action for workers seeking to vindicate such rights.

Hazleton is a City of Third Class with an Optional Plan B form of government. (N.T. 3/15/07 at 204). The powers a city has in Pennsylvania are limited, and are defined largely by the plan of government that locality adopts. Under Pennsylvania law, "[m]unicipalities are not sovereigns; they have no original or fundamental power of legislation; they

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106 at 64-65; Doc. 150 at 83). The arguments they provide are premised on the powers enjoyed by these different types of cities. Because the testimony makes clear that Hazleton is a city of the Third Class with an Optional Plan B (strong mayor-council) form of government, we will base our analysis on the powers accorded such cities in Pennsylvania law.

have the right and power to enact only those ordinances which are authorized by an act of the legislature." *Genkinger v. City of New Castle,* 368 Pa. 547, 84 A.2d 303, 304 (1951); *see also Cleaver v. Board of Adjustment of Tredyffrin Twp.,* 414 Pa. 367, 200 A.2d 408, 412 (1964); *Devlin v. City of Philadelphia,* 580 Pa. 564, 862 A.2d 1234, 1242 (2004); *Denbow v. Borough of Leetsdale,* 556 Pa. 567, 729 A.2d 1113, 1118 (1999) (holding that "[m]unicipal corporations have no inherent powers and may do only those things which the Legislature has expressly or by necessary implication placed within their power to do."). "'Any fair, reasonable doubt as to the existence of power is resolved by the courts against its existence in the corporation, and therefore denied.'" *Kline v. City of Harrisburg,* 362 Pa. 438, 68 A.2d 182, 185 (1949) (quoting DILLON ON MUNICIPAL CORPORATIONS, § 89).

Pennsylvania law defines the basic powers of a City of the Third Class in 53 PENN. STAT.. § 37402. Under that section, a Third-Class city may "(1) sue and be sued; (2) purchase land and hold real and personal property for the use of the city"; "(3) lease, sell and convey any real or personal property owned by the city," make orders that serve the interests of the city in doing so; (4) form contracts in order to carry out city affairs; "(5) have and issue a corporate seal"; (6) display the Pennsylvania flag on public buildings; and (7) appropriate and use money appropriated to the city by other sources. 53 PENN. STAT.. 37402(1-7).

In addition, the Third Class City Code enumerates sixty-eight specific powers enjoyed by such municipalities. These powers include the power to pay debts and expenses, arrange for garbage collection and removal, dispose of dangerous dogs, inspect and regulate fireplaces, number buildings, prohibit nuisances, regulate signs and prevent riots. 53 PENN. STAT.. § 37403(1),(6),(9), (10)(19),(16),(17),(25). A third-class city also has the power "to make and adopt all such ordinances, by-laws, rules and regulations, not inconsistent with or restrained by the Constitution and laws of this Commonwealth, as may be expedient or necessary for the proper management, care and control of the city and its finances, and the maintenance of the peace, good government, safety and welfare of the city, and its trade, commerce and manufactures." 53 PENN. STAT. § 37403(60). A city may pass legislation "necessary in and to the exercise of the powers and authority of local self-government in all municipal affairs." *Id.* A city can establish fines for violations of ordinances, but may not enact ordinances that "[contravene] or [violate] any of the provisions of the Constitution of the United States or the Commonwealth, or of any act of the Assembly heretofore or that may be hereafter passed and in force in said city." *Id.*

In general, Hazleton has the power to issue licenses for businesses to operate within the City. *See Girard Trust Co. v. Philadelphia,* 336 Pa. 433, 9 A.2d 883, 884 (1939) (holding that "[t]he authority to inspect and license elevators is based upon the exercise

of police power, the residual source of which is in the Commonwealth and inheres in its subdivisions upon their creation."). Thus, "municipalities in the exercise of the police power may regulate certain occupations by imposing restrictions which are in addition to, and not in conflict with, statutory regulations." *Western Pennsylvania Restaurant Ass'n v. Pittsburgh*, 366 Pa. 374, 77 A.2d 616, 620 (1951). In a general sense, then, Hazleton has the power to license businesses under any terms that are not in conflict with state law. Since no state statute regulates the employment of illegal aliens, Hazleton's restrictions on the employment of such workers do not violate state law.

The private right of action supplied by the city to workers who lose their jobs to illegal aliens, however, alters the terms of employment established under state law and exceeds Hazleton's power as a municipality by contradicting the terms of state law. Pennsylvania is an at-will employment state, meaning that an employee can "be discharged at any time unless her discharge was wrongful in that it violated a clearly recognized public policy." *McCartney v. Meadowview Manor, Inc.*, 353 Pa.Super. 34, 508 A.2d 1254 (1986). Thus, "[a]bsent a statutory or contractual provision to the contrary, the law has taken for granted the power of either party to terminate an employment relationship for any or no reason." *Geary v. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174, 176 (1974); *see also Knox v. Bd. of Directors of Susquenita School Dist.*, 585 Pa. 171, 888 A.2d 640, 647 (2005) (holding that "Pennsylvania has long

subscribed to the at-will employment doctrine. Exceptions to that doctrine have generally been limited to instances where a statute or contract limits the power of an employer unilaterally to terminate the employment relationship.").

IIRA disrupts this well-settled principle of state law. An employer in any other Pennsylvania city is not liable to civil suit from that employee if the employer happens to employ an "unlawful worker."[77] At-will employment means that an employer can terminate a workers' employment at any time unless the termination violates a clearly defined statutory right or public policy.[78] Here, in the absence of the

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[77] We note that this cause of action appears to impose strict liability on the employer, as it defines as an "unfair business practice" "the discharge of any employee who is not an unlawful worker by a business entity in the City" and provides the "discharged worker" with a private right of action against the employer for this unfair practice. IIRA § 4.E(1-2). Presumably, an employee who brought that cause of action would not have to prove any *mens rea* on the employer's part, but need only show that the employer had employed an unauthorized worker to prevail in that private claim. Such a private cause of action would thus appear to serve as a positive enforcement mechanism, requiring an employer to take positive steps to insure that no "unlawful workers" remained on the payroll to avoid an expensive lawsuit.

[78] An employer who is sued after terminating an employee on the basis of "race, color family status, religious creed, ancestry, handicap or disability, age, sex, national origin, the use of a guide or support animal because of blindness, deafness or physical handicap of the user or because the user is a handler or trainer of support or guide animals" cannot resort to the defense that Pennsylvania is an "at-will" employment state because such

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Ordinance, an employer would not face civil liability under Pennsylvania law for terminating a worker's employment while employing another worker defined by the Hazleton Ordinance as "unlawful." Whatever liability an employer might face under federal law for employing such a worker, neither state nor federal law gives discharged employees the right to sue based on an employer's unlawful employment of another.[78]

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an employee has a clear legal right to dispute such firing. 43 PENN. STAT., § 953; *see also, Cisco v. United Parcel Services, Inc.*, 328 Pa.Super. 300, 476 A.2d 1340, 1343 (1984) (holding that "'[t]he sources of public policy [which may limit the employer's right of discharge] include legislation; administrative rules, regulation, or decision; and judicial decision. In certain instances, a professional code of ethics may contain an expression of public policy . . . Absent legislation, the judiciary must define the cause of action in case-by case determinations.'") (quoting *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A.2d 505, 512 (1980)). We note here that this statute gives no cause of action to a worker discriminated against because of legal immigration status.

[78] Marc Rosenblum, an expert witness for the plaintiffs, testified that no "comparable provision" like the private right of action in Section 4.E exists under federal law. (N.T. 3/15/07 at 60). On cross-examination, defendant challenged this claim, arguing that "the 1996 [Illegal Immigration Reform and Immigration Responsibility] act amended Title 18, Section 1961 of the U.S. Code and created a private right of action for employees who have suffered economic injury by employers because of employers who hire unauthorized aliens[.]" (*Id.* at 138). That statute, counsel pointed out, allowed injured employees to recover treble damages against employers who violate the act. (*Id.* at 139). Defense counsel cited to three cases which he claimed underscored the similarity between Hazleton's private right of action and provisions of federal law authorizing workers to sue their employers for firing them while continuing to

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employ undocumented workers, *Williams v. Mohawk Industries, Inc.*, 411 F.3d 1252 (11th Cir.2005), *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir.2002) and *Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602 (6th Cir.2004). We find this claim unpersuasive; those cases do not hold what defendant claims they do. The statute to which defendant cites, 18 U.S.C. § 1961, is part of the Racketeer Influenced and Corrupt Organizations Act (RICO), a section of the United States Code that addresses organized crime. One provision of that act indeed offers a private right of action, providing that "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter [18 U.S.C. § 1962] may sue therefor in any appropriate court and shall recover threefold the damages he sustains and the cost of the suit." 18 U.S.C. § 1964(c). To prevail on a claim under the statute, a plaintiff must prove "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima v. Imrex Co.*, 473 U.S. 479, 496, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985). Further, "a plaintiff may sue under § 1964(c) only if the alleged RICO violation was the proximate cause of the plaintiff's injury." *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, ___, 126 S.Ct. 1991, 1994, 164 L.Ed.2d 720 (2006). In *Williams*, the court found that a plaintiff could state a civil RICO claim against an employer who had violated section 274 of the Immigration and Nationality Act, "related to bringing in and harboring certain aliens." *Williams*, 411 F.3d at 1257. Plaintiff had alleged that defendant engaged in a scheme to hire hundreds of illegal immigrant workers, and that this conduct could constitute part of a racketeering claim. *Id.* We find that defendant reads this case – and other cases that find that plaintiffs can state a RICO claim (in part) by alleging that defendant violated federal immigration law – too broadly. A plaintiff cannot, as defendant insists, state a claim for damages against an employer merely because that employer hired an unauthorized worker. Instead, to state a RICO claim a plaintiff must also allege that the employer's illegal conduct was part of an enterprise engaged in a pattern of illegal activity and that the employer's conduct was the proximate cause of plaintiff's injury. Under the Hazleton Ordinance, by contrast, a plaintiff must only demonstrate that the employer knowingly kept a single unauthorized worker

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Defendant's argument that the ability of a discharged worker to bring a cause of action for wrongful termination in Pennsylvania courts, "whether or not" the cause is "meritorious" is unavailing; defendant's Ordinance would make meritorious a cause of action that would previously have been dismissed as lacking a legal basis. Accordingly, the private right of action contained in IIRA is "inconsistent with or restrained by the Constitution and laws of this Commonwealth," and is invalid.[80] 53 PENN. STAT., § 37403(60).

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on staff after terminating the plaintiff. Indeed, the only real similarities between the Hazleton Ordinance and the RICO statute are the availability of treble damages to plaintiffs and the fact that employment of an unauthorized worker could be part of the basis for a lawsuit. To adopt defendant's reasoning that Hazleton's private cause of action "matches" that available under RICO, we would have to ignore all of the elements of a civil RICO claim except the fact that damages are trebled. We decline to do so. No private cause of action mirroring that in the Hazleton Ordinance exists in federal law.

[80] The City, in its post-trial memorandum, again points to the RICO statute to argue that the private cause of action created by IIRA is not a "'novel'" provision, but is instead one grounded in rights expressly established by federal law. (Doc. 219 at 87). Defendant points to the cases cited in the previous footnote and declares that "[p]laintiffs would do well to familiarize themselves with these federal statutes. The IIRA Ordinance Section 4.E is based upon them." (*Id.*). Plaintiffs' post-trial memorandum makes clear that they have familiarized themselves with the private cause of action contained in the RICO statute. Indeed, unlike the defendant, plaintiffs have recognized the elements required to maintain a private cause of action under the RICO statute. Defendant fails to recognize that causes of action are not similar simply because both offer the

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While the Pennsylvania legislature could add a private right of action to Pennsylvania law that did not violate the federal constitution or disrupt a federal statutory scheme,[81] the distribution of powers between the Commonwealth and subdivisions of the Commonwealth does not permit a municipality to burden the Commonwealth's courts with new causes of action. Hazleton could argue that the city's power to enforce ordinances permitted the use of this private right of action, but such private causes of action are unnecessary to the city's regulatory scheme.[82] The

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possibility of treble damages for certain violations of immigration laws.

[81] We reject the defendant's contention that IIRA does not disrupt the employer-employee relationship in Pennsylvania because employers are required to examine employee's identification documents by federal law, and because federal law prohibits the knowing employment of an illegal alien. Citing 8 U.S.C. § 1324. This argument seems contrary to the principles of preemption discussed *supra* at part A. If federal law prohibits employment of undocumented workers and provides an enforcement mechanism for doing so, Hazleton's efforts to add new document checks and private rights of action to enforce those provisions of federal law appear to interfere with a scheme already established by federal legislation. We decline to adopt the argument that a city may avoid restrictions on its action under state law by claiming a right to enforce federal law, especially when that federal law contains no provisions for such enforcement.

[82] Indeed, the City's scheme as presently constructed appears inconsistent: an employer is liable to fines from the City only when that employer "knowingly" employs an illegal alien. Ordinance 2007-6. The employer may avoid liability by participating in the Basic Pilot program. Ordinance 2006-18 § 4.B.5. Under the private right of action, however, the City makes an

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city has its own system for enforcing this portion of IIRA and its own penalties for those who employ unlawful workers. An employer is not found in violation of IIRA by a court decision that grants an "aggrieved worker" compensation for lost wages, but instead after an investigation by the Code Enforcement Office. We conclude that this private right of action contained in IIRA is simply an attempt to add to the rights workers have in the city, and such action is prohibited by the Third Class City Code and the effort of Pennsylvania to operate as an at-will employee state.

Accordingly, we find that the provisions of Section 4.E of IIRA that provides a private right of action to discharged worker are *ultra vires* and may not be enforced. Since provisions of IIRA are severable, our decision on this matter affects only Section 4.E of the IIRA. *See* Ordinance 2006-18 at § 6.B (establishing that "[I]f any part of [sic] provision of this Chapter is in conflict or inconsistent with applicable provisions of federal or state statutes, or is otherwise held to be

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employer liable to any discharged worker who shows continued employment of an unauthorized worker. *Id.* at § 4.E. That liability applies regardless of whether the employer knew of the violation or not. *Id.* at § 4.E.1 (establishing that "[t]he discharge of any employee who is not an unlawful worker by a business entity in the City is an unfair business practice if, on the date of the discharge, the business entity was not participating in the Basic Pilot program and the business entity was not employing an unlawful worker."). In other words, an employer can comply with IIRA and still be liable to ex-employees under IIRA.

invalid or unenforceable by any court of competent jurisdiction, such part of [sic] provision shall be suspended and superseded by such applicable laws or regulations, and the remainder of this Chapter shall not be affected thereby.").

B. Landlord and Tenant Act

Count VI of plaintiffs' second amended complaint asserts a cause of action under Pennsylvania's Landlord and Tenant Act of 1951, 68 PENN. STAT.. § 250.101 *et seq.* (hereinafter L/T Act). Plaintiff argues that the L/T Act is meant to be the sole source of rights, remedies and procedures governing the landlord/tenant relationship in Pennsylvania and municipalities may not alter or supplement the law. The Hazleton ordinances, according to the plaintiffs, add requirements to landlords and tenants and thus violates the L/T Act. Defendant contends that the ordinances do not violate the L/T Act. We agree with the defendant.

Generally, the L/T Act governs the relationship between landlords and tenants including rights and duties for both, and it also provides procedures for eviction. *See, generally*, 68 PENN. STAT.. §§ 250.101 *et seq.* In addition, the L/T Act provides: "All other acts and parts of acts, general, local and special, inconsistent with or supplied by this act, are hereby repealed. It is intended that this act shall furnish a complete and exclusive system in itself." 68 PENN. STAT.. § 250.602. Plaintiffs assert that this clause

and the remainder of the L/T Act pre-empts the ordinances.

The Pennsylvania Supreme Court, however, has held that the L/T Act sets forth the procedures for eviction and does not address the substantive issue of when a landlord has a right to evict. *Warren v. City of Philadelphia*, 382 Pa. 380, 115 A.2d 218, 221 (1955). *Warren* holds that Pennsylvania did not pass the L/T Act pursuant to its police powers; therefore, local municipalities may enact local laws affecting landlord/tenant law pursuant to their police powers as long as those laws do not conflict with the L/T Act. *Id.* at 221.

Plaintiffs assert that the ordinances do conflict with the L/T Act. After a careful review, we disagree. Plaintiffs argue that the time frame provided by IIRA conflicts with the L/T Act because it requires that a landlord correct a violation within five (5) days of notice of the violation from Hazleton. (IIRA § 5.B.(3)). Under the L/T Act, according to the plaintiffs' calculations – which we accept as true for the purposes of this analysis – a tenant cannot be evicted for a minimum of twenty-three (23) days. We find no conflict here. In order to correct a violation under IIRA, the landlord merely has to provide a notice to quit or commence an action for the recovery of possession of the property. (IIRA § 7.D.). In other words, the landlord must begin the eviction process within five days, it does not have to be completed within those five days. Thus, the laws do not conflict.

Plaintiff also argues that the Tenant Registration Ordinance conflicts with the L/T Act because it requires a landlord to take reasonable steps to "remove or register" unregistered occupants of apartments within ten (10) days of learning of the unauthorized occupancy. (RO § 9.b.). Once again, this section does not conflict with the L/T Act. It does not require an eviction within ten days, it merely requires that reasonable steps be taken within that period. Reasonable steps would be steps in compliance with the L/T Act.

Next, plaintiffs argue that the Tenant Registration Ordinance violates the L/T Act because it requires additional occupants of a rental unit to obtain the written permission of the landlord and obtain an occupancy permit. (RO § 10.b.) Plaintiffs argue that this requirement is in conflict with the L/T Act's because under the L/T Act tenants have a right to invite social guests, family, or visitors for a reasonable period of time.

We agree that the L/T Act permits such visitors. *See* 68 PENN. STAT.. § 250.504-A. The Tenant Registration Ordinance, however, does not forbid visitors or guests. The occupancy permit requirements apply to one who is an "occupant." "Occupant" is defined in the Ordinance as "a person age 18 or older who resides at a Premises." (RO § 1.m.). Thus, it is inapplicable to social guests and visitors and not in conflict with the L/T Act. For the above reasons, we find that the harboring provisions of IIRA and RO do not violate the L/T Act.

C. Police powers

Plaintiffs' ninth cause of action is that defendant's ordinances exceed its legitimate police powers. (Compl.¶¶ 214-237). Defendant contends that the passage of the ordinances was a legitimate exercise of its police powers.

Generally, a municipality possesses "police powers" that can be used to enact legislation to promote public health, safety and general welfare. *Balent v. City of Wilkes-Barre,* 542 Pa. 555, 669 A.2d 309, 314 (1995).

> [T]he police power delegated by the state is not infinite and unlimited. The action taken thereunder must be reasonable, it must relate to the object which it purports to carry out, and it must not invade the fundamental liberties of the citizens. *Warren v. Philadelphia,* 382 Pa. 380, 115 A.2d 218 (1955); *Otto Milk Company v. Rose,* 375 Pa. 18, 99 A.2d 467 (1953). It must also be remembered that even legitimate legislative goals cannot be pursued by means which stifle fundamental personal liberty when the goals can be otherwise more reasonably achieved. *See Shelton v. Tucker,* 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960).

Commonwealth v. Sterlace, 24 Pa.Cmwlth. 62, 354 A.2d 27 (1976) (finding that a municipality's ordinance dealing with the distribution of advertising material unconstitutionally burdened the First Amendment).

As we have found that the defendant's ordinances violate the plaintiffs' fundamental rights under the United States Constitution we need not determine whether they are otherwise a valid exercise of its police powers.[83] In other words, enacting an unconstitutional ordinance is in itself a violation of the defendant's police powers. *See id.*

Accordingly, we find that plaintiff has prevailed on its ninth cause of action in that the defendant violated its police powers with these ordinances.

Conclusion

Federal law prohibits Hazleton from enforcing any of the provisions of its ordinances. Thus, we will issue a permanent injunction enjoining their enforcement. With respect to each particular count we conclude as follows:

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[83] We note that generally, it is "within the mainstream of . . . police power regulation" to prohibit the knowing employment of aliens who are not entitled to permanent residence. *DeCanas,* 424 U.S. at 356, 96 S.Ct. 933. Additionally, the Pennsylvania Supreme Court has held that "rent and eviction controls are valid exercises of the police power." *Warren v. City of Philadelphia,* 382 Pa. 380, 115 A.2d 218, 220 (1955).

> Plaintiffs' argument is very fact-based. They assert that testimony at the trial established that the ordinances do not serve the health safety and welfare of the 'citizens of Hazleton'. We need not address these factual issues to determine that the enactment of the ordinances was in fact an improper exercise of the police powers.

We find for the plaintiffs on Count I of the complaint. Federal law pre-empts IIRA and RO. The ordinances disrupt a well-established federal scheme for regulating the presence and employment of immigrants in the United States. They violate the Supremacy Clause of the United States Constitution and are unconstitutional.

We find for the plaintiffs on Count II of the complaint as well. The Hazleton ordinances violate the procedural due process protections of the Fourteenth Amendment to the United States Constitution. They penalize landlords, tenants, employers and employees without providing them the procedural protections required by federal law, including notice and an opportunity to be heard. Our analysis applies to illegal aliens as well as to legal residents and citizens. The United States Constitution provides due process protections to *all* persons.

We will dismiss Counts III and IV of the complaint regarding Equal Protection and the Fair Housing Act, 42 U.S.C. §§ 3601, *et seq.*, respectively. Neither IIRA nor RO facially discriminate on the basis of race, ethnicity or national origin.

On Count V, which alleges a violation of plaintiffs' right to contract under 42 U.S.C. § 1981, we find for the plaintiffs. Just as with the Fourteenth Amendment analysis, illegal aliens are "persons" under that statute, and the City may not burden their right to contract more than that of other persons.

Plaintiffs prevail in part on Count VI, which challenges the power of the City under Pennsylvania law to enact the employment-related provisions of IIRA. The defendant acted *ultra vires* in enacting the portion of IIRA which creates a private cause of action for a dismissed employee. The City, however, has the power to license businesses in ways that do not violate Pennsylvania law. Thus, we will dismiss the remaining portion of the count.

We will dismiss Count VII, which challenges the power of the City to enact the housing provisions of the ordinances under the Pennsylvania Landlord Tenant Act, 68 PENN. STAT.. §§ 250.101 *et seq.* The ordinances provide renters the procedural protections the statute requires.

We find that we lack sufficient evidence to make a determination on Count VIII of the complaint, which contends that the Hazleton ordinances violate plaintiffs' privacy rights. As written, the ordinances are too vague for us to analyze what information will be required from workers and tenants. We therefore cannot determine whether the ordinances violate plaintiffs' privacy rights.

Plaintiffs prevail on Count IX, which contends that defendant exceeded its police powers. Defendant exceeded its police powers by enacting unconstitutional ordinances.

Whatever frustrations officials of the City of Hazleton may feel about the current state of federal immigration enforcement, the nature of the political

system in the United States prohibits the City from enacting ordinances that disrupt a carefully drawn federal statutory scheme. Even if federal law did not conflict with Hazleton's measures, the City could not enact an ordinance that violates rights the Constitution guarantees to every person in the United States, whether legal resident or not. The genius of our Constitution is that it provides rights even to those who evoke the least sympathy from the general public. In that way, all in this nation can be confident of equal justice under its laws. Hazleton, in its zeal to control the presence of a group deemed undesirable, violated the rights of such people, as well as others within the community. Since the United States Constitution protects even the disfavored, the ordinances cannot be enforced. An appropriate order follows.

VERDICT

AND NOW, to wit, this 26th day of July 2007, we hereby **DECLARE** that Hazleton Ordinance Nos.2006-18, 2006-40 and 2007-6 (hereinafter "IIRA") and Hazleton Ordinance No.2006-13, (hereinafter "RO"), are unconstitutional. We **PERMANENTLY ENJOIN** the defendant from enforcing IIRA and RO.

All the plaintiffs have standing to pursue this action except Rosa Lechuga and Jose Luis Lechuga.

The Lechugas lack standing because this lawsuit would not remedy the injury they have suffered.[84]

Due to the unique nature of the issues in this lawsuit, the intense public interest in the outcome and the public antipathy expressed towards participants in the case, the unnamed plaintiffs are allowed to proceed anonymously.

We have addressed the ordinances as amended through March 2007. The ordinances in their amended versions do not eliminate the grounds for plaintiffs' constitutional challenges.

With regard to each count of the complaint, our verdict is as follows: Count I, the Supremacy Clause, we find **FOR PLAINTIFFS**. Federal law pre-empts IIRA and RO.

Count II, Due Process, we find **FOR PLAINTIFFS**. IIRA and RO violate the procedural due process protections of the Fourteenth Amendment to the United States Constitution.

Counts III and IV, Equal Protection and the Fair Housing Act, 42 U.S.C. §§ 3601, *et seq.*, respectively, are **DISMISSED**. Neither IIRA nor RO facially discriminate on the basis of race, ethnicity or national origin.

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[84] Plaintiff Humberto Hernandez is dismissed as plaintiffs have presented no evidence regarding him.

Count V, 42 U.S.C. § 1981, we find **FOR PLAINTIFFS**. Illegal aliens are "persons" under 42 U.S.C. § 1981. IIRA and RO impermissibly burden their right to contract.

Count VI, Home Rule Charter Law, we find partially **FOR PLAINTIFFS**, and we **DISMISS** partially. We find **FOR PLAINTIFFS** with regard to the portion of IIRA which creates a private cause of action for a dismissed employee. With regard to the other portions of IIRA and RO, defendant did not act beyond its municipal powers, and we **DISMISS** that portion of the count.

Count VII, Pennsylvania Landlord and Tenant Act, 68 PENN. STAT.. §§ 250.101 *et seq* is **DISMISSED**. Neither IIRA nor RO violate the procedural protections required under the Landlord and Tenant Act.

Count VIII, privacy rights, is **DISMISSED**. We lack sufficient evidence to make a determination with regard to plaintiffs' privacy rights.

Count IX, police powers, we find **FOR PLAINTIFFS**. Enacting unconstitutional laws is beyond the defendant's police powers.

APPENDIX

HISTORY OF IMMIGRATION REGULATION IN AMERICA

The history of federal regulation of immigration is one of a transformation from a largely open system to one where federal rules govern nearly every aspect of the immigrant experience, from the conditions under which new residents may enter to the terms under which they may labor. Prior to the end of the nineteenth century, immigration restriction was minimal: the government "counted the number of immigrants for statistical purposes, and it decreed certain minimum living conditions aboard ship." JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925, 43 (1983); *see also* SUCHENG CHAN, *European and Asian Immigration into the United States in Comparative Perspective*, 1820s to 1920s, in IMMIGRATION RECONSIDERED: HISTORY, SOCIOLOGY AND POLITICS, 62 (Virginia Yans-McLaughlin, ed.,1990) (finding that "[e]xcept for the sedition laws passed in the early years of the republic, the United States had no immigration laws until 1875, when prostitutes and convicts were excluded.").[85] In 1882, Congress denied entry to "convicts, lunatics, idiots, and persons likely to become a public charge." *Id.* This law added to the

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[85] Although this does not signify that all groups immigrating to America before the late nineteenth century were welcomed. From the earliest colonial settlements in the 1600s, more-established residents often reacted negatively to immigrants perceived as different or in some way threatening.

basic restrictions first instituted by the federal government in 1875, when Congress excluded from entry "persons convicted of 'crimes involving moral turpitude' and prostitutes." MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA, 59 (2004).

Though these federal laws restricted who could enter the United States, they did not place any numerical quotas or absolute restrictions on any class of persons. Reflecting a society dominated by the proposition that racial identity determined one's capacity to participate in society, however, late nineteenth-century immigration law enacted much more robust restrictions on immigration from countries identified by contemporary ideology as populated by "inferior" races.[86] Years of agitation led to new restrictions on who could enter the United States in the years during and after the First World War.[87] In 1917,

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[86] Congress often aimed such legislation at Asians. Examples include: the 1882 Chinese Exclusion Act; the "Gentlemen's Agreement of 1907," which prevented the immigration of Japanese men; and the 1924 Immigration Act's exclusion of "aliens ineligible for citizenship," which included "peoples of all the nations of East and South Asia." Ngai at 37. An 1877 Congressional Report on the proposed Chinese Exclusion Act demonstrates the racial attitudes that drove these policies: the report contended that "'[t]here is not sufficient brain capacity in the Chinese race to furnish motive power for self-government'. Upon the point of morals, there is no Aryan or European race which is not far superior to the Chinese." Kitty Calavita, *The Paradoxes of Race, Class, Identity, and "Passing": Enforcing the Chinese Exclusion Acts, 1882-1910*, 25 LAW & SOC. INQUIRY 1, 4.

[87] This opposition to immigration came from a wide variety of groups and perspectives. Labor unions, fearful that immigrants

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Congress restricted immigration by political radicals[88] and imposed a literacy test on those seeking

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drove down wages, frequently agitated for restrictions on entry, though their positions were equivocal; many union leaders – like Samuel Gompers of the American Federation of Labor – were immigrants or deeply connected to the immigrant experience. Higham at 70-72. The Ku Klux Klan, originally organized in the South after the Civil War to intimidate black voters, reappeared in northern areas in 1915 to take part in the debate about immigration, arguing for restrictions. *See* Higham, 286-99. This version of the Klan, unlike "the first Klan, which admitted white men of every type and background . . . accepted only native-born Protestant whites and combined an anti-Negro with an increasingly anti-foreign outlook." *Id.* at 288. Other groups argued that immigrants were responsible for crime and disorder in America's rapidly growing cities, and that social order and control required restrictions on who could enter the country. *See, e.g.* Higham at 90 (finding that "[a]nti-foreign sentiment filtered through a specific ethnic stereotype when Italians were involved; for in American eyes they bore the mark of Cain. They suggested the stiletto, the Mafia, the deed of impassioned violence."). Finally, some contended that immigrants, particularly those who were from southern and eastern Europe and were Catholic or Jewish, were diluting American culture by undermining its traditional bases. *See* Higham at 95-96 (establishing that "[h]ardly had the new [southern and eastern European] immigration begun to attract attention when race-conscious intellectuals discovered its hereditary taint. In 1890 the Brahmin president of the American Economic Association alerted his fellow scholars to the new tide of 'races . . . of the very lowest stage of degradation.' About the same time [U.S. Senator] Henry Cabot Lodge noticed the shift away from northwestern Europe and began to bristle at its racial consequences."). *See also* Ngai, IMPOSSIBLE SUBJECTS at 93 (finding that "[t]he Johnson-Reed Immigration Act of 1924 was motivated primarily by political concerns over the country's ethnic and racial composition, but economic factors were still relevant.").

[88] The law "exclude[d] from the United States not only individual advocates of violent revolution but also those who

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entry.[89] Higham at 202. The 1921 Immigration Act tightened restrictions on immigration, establishing "the first sharp and absolute numerical restrictions on European immigration" in United States history and implementing "a nationality quota system based on the pre-existing composition of the American population." *Id.* at 311. These attempts at restricting immigration culminated in the Immigration Act of 1924, which capped yearly entries into the United States at 150,000, with quotas assigned to each country based on two percent of the foreign-born individuals of each nationality in the United States in 1890. RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS, 209 (2d ed., 1998). The Act also excluded "aliens ineligible for citizenship" from entry, adding Japanese people to the list of those who were excluded from immigrating altogether.[90] The Act did

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advocated sabotage or belonged to revolutionary organizations; [and] second, [determined] to deport any alien who at any time after entry was found preaching such doctrines." Higham at 202.

[89] The literacy test prevented entry for "adult immigrants unable to read a simple passage in some language," with only two exceptions: "[a]n admissible alien might bring in members of his immediate family despite their illiteracy, and in the interest of Russian Jews the same exemption applied to all aliens who could prove they were fleeing from religious persecution . . . refugees from political prosecution received no such exemption." Higham at 203.

[90] Previous laws had excluded Chinese and Asian Indian immigrants from entering the United States; the 1924 Act simply solidified these efforts to restrict Asian immigration. Takaki at 209. Because the Philippines became a United States possession after the 1898 war with Spain, however, the act did

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not, however, restrict immigration from Mexico or other countries in the Western Hemisphere, though it did establish regulations for entry.[91] Ngai, IMPOSSIBLE SUBJECTS at 50.

Historian Mae Ngai has noted that passage of the 1924 act meant "that numerical restriction created a new class of persons within the national body – illegal aliens – whose inclusion in the nation was at once a social reality and a legal impossibility." Ngai, IMPOSSIBLE SUBJECTS at 57. Much of federal immigration law in subsequent decades would be aimed at identifying and controlling these illegal residents,

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not restrict Filipino migration to Hawaii or the United States mainland. Filipino migration therefore increased dramatically after 1924 as more jobs became available. Ngai at 103. In 1930, 56,000 Filipinos, most of them men, lived on the west coast. *Id.* That number represented a tenfold increase from 1920. *Id.* Their presence sometimes led to violence from locals. In 1927, a Washington apple grower brought eleven Filipino workers he hired to a local jail for protection after he learned that white people had threatened to "'deport'" them. *Id.* at 105. At the same time, more than 500 Filipinos left the Yakima Valley region "after white residents threatened to attack them." *Id.*

[91] According to historian Mae Ngai, "while practicing exclusion toward Asia and restriction toward Europe, Congress imposed no practical restrictions on immigration from the countries of the Western Hemisphere." Ngai continues to say that many nativistic Americans, however, supported exclusion or restriction of Mexican immigrants, who were considered part of an "unstable 'mongrel race.'" Mae Ngai, *The Lost Immigration Debate: Border Control Didn't Always Dictate Policy*, 3, BOSTON REVIEW (September/October 2006). Retrieved July 23, 2007 from http:/bostonreview.net/BR31.5/ngai.html.

provisions not previously present in American law.[92] Before the changes brought by the immigration regulation of the 1910s and 1920s, the process of entering the United States as an immigrant was fairly simple, if invasive: an immigrant need only present herself at the border for inspection.[93] Once immigrants cleared this initial hurdle (represented to many by Ellis Island), they were free to enter the country, and did not need to carry any documents or do anything to prove particular status.[94] The passage of quotas and

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[92] We note that the descendants of non-Asian immigrants who entered this country before the restrictions of the 1920s who condemn present-day illegal immigrants by pointing out that "when my relatives came to this country, they followed the law" ignore one very crucial fact: virtually no law existed to prevent anyone from entering the country prior to that period. No federal crime for unauthorized entry existed until 1929. *See* Ngai, IMPOSSIBLE SUBJECTS at 60.

[93] Historian Mae Ngai notes that Mexican immigrants were still subject to immigration requirements in the 1924 law, which included presentation of a passport or visa; payment of a head tax; and inspection at entry. Ngai, *Lost Immigration Debate* at 4. Ngai describes this process as it occurred for Mexicans seeking to enter the United States in a later period: "inspection at the Mexican border involved a degrading procedure of bathing, delousing, medical-line inspection, and interrogation. The baths were new and unique to Mexican immigrants, requiring them to be inspected while naked, have their hair shorn, and have their clothing and baggage fumigated. Line inspection, modeled after the practice formerly used at Ellis Island, required immigrants to walk in single file past a medical officer." Ngai, IMPOSSIBLE SUBJECTS at 68.

[94] One notable exception would be Chinese immigrants who had fraudulently obtained reentry certificates or become "paper sons."

other restrictions on immigration, however, meant that the status of many aliens in the United States had become far from clear.[95] Much of the subsequent history of American immigration law is the history of an attempt to determine the status of aliens living in the United States.[96] Only in 1929 did the United States first provide penalties for unlawful entry, making the first such entry a misdemeanor punishable by up to a year in jail or a $1,000 fine and the second offense a felony, punishable by two years imprisonment or a $2,000 fine. Ngai, IMPOSSIBLE SUBJECTS at 60.

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[95] Mae Ngai points out that after the 1924 Act, "many Mexicans entered the United States through a variety of means that were not illegal but comprised irregular, unstable categories of lawful admission, making it more difficult to distinguish between those who were lawfully in the country and those who were not." Ngai, IMPOSSIBLE SUBJECTS at 70.

[96] This situation was reflected by the changing role that deportation played in federal policy. An 1875 federal law that excluded convicts and prostitutes from entry failed to "provide for their deportation except as an immediate part of the exclusion process." Daniel Kanstroom, *United States Immigration Policy at the Millenium: Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L.REV.. 1889, 1909 (2000). Only in 1891 did Congress pass legislation providing for the deportation of aliens who became public charges within a year of their arrival, provided that the condition that caused the alien's hardship existed prior to arrival in the country. Ngai, IMPOSSIBLE SUBJECTS at 59. The steamship companies that had carried such an immigrant to the country was liable for the cost of the immigrant's return. *Id.* Congress otherwise established no means or funding for deportation.

Congress made occasional changes to this immigration system over the next forty years,[97] but the use of quotas and the principal of national exclusion remained central to the federal scheme. The most fundamental change in federal regulation of immigration came with the passage of the Immigration Act of 1965. This act abolished the national-origins quotas established in the 1924 act and allowed an annual admission of 170,000 Immigrants from the Eastern

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[97] Examples of such changes include: the establishment of contract labor programs involving West Indian agricultural laborers in the Southeast, Puerto Rican agricultural workers in the Northeast (who were U.S. citizens) and the well-known *Bracero* Program, by which 4.6 million Mexican workers traveled to the United States to work in agriculture between 1942 and 1964 (Ngai, IMPOSSIBLE SUBJECTS at 138-39); the end of Chinese exclusion in 1943 (*Id.* at 204); the Chinese Confession Program that began in 1956 and allowed Chinese persons who confessed that they "had entered the country by fraudulent means" the opportunity to adjust their status (under law current at the time seven years of continuous United States residency or ninety days service the armed forces could lead to permanent residency) (*Id.* at 218); the 1948 Displaced Persons Act, which "provided for the admission of 202,000 European refugees over two years" (*Id.* at 236); the 1952 McCarran-Walter Act, which "brought many fragments of the nation's immigration and naturalization laws under a single code," capped immigrants at 155,000 per year under the quota system, maintained the national origins basis for national quotas, imposed quotas on former British colonies in the Caribbean and lifted restrictions on Japanese and Korean immigration (*Id.* at 238); and the asylum extended by the United States government to Vietnamese "boat people" in the 1970s. Aristide R. Zolberg, *Reforming the Back Door: The Immigration Reform and Control Act of 1986 in Historical Perspective,* 322, *in* IMMIGRATION RECONSIDERED (YANS-MCLAUGHLIN, ed.).

Hemisphere and 120,000 from the Western. Takaki, at 419. The restrictions on immigration for the Western Hemisphere represented a radical change in restrictions on immigration from that part of the world.[98] Ngai, IMPOSSIBLE SUBJECTS at 258. The law still provided for national quotas, but distributed them equally, not on the basis of previous immigration in particular years. Takaki at 419. The law also exempted from the quota spouses, minor children and parents of United States citizens. *Id.* Immigrants would be admitted according to certain preference categories for adult family members, professionals, workers for unfilled positions and refugees. *Id.* These changes led to an even more active role for the federal government in investigating and determining the status of immigrants, since "strict positive certification was required to ensure that they would not compete with Americans." Aristide R. Zolberg, *Reforming the Back Door: The Immigration Reform and Control Act of 1986 in Historical Perspective,* 320, in IMMIGRATION RECONSIDERED (YANS-MCLAUGHLIN, ed.). Still, the 1965 Act represented a major change in the focus of immigration policy

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[98] Ngai notes that a change in the law in 1976 that assigned a 20,000 annual-immigrant quota to all countries in the western hemisphere "recast Mexican migration as 'illegal.' When one considers that in the early 1960s annual 'legal' Mexican migration comprised 200,000 braceros and 35,000 regular admissions for permanent residency, the transfer of migration to 'illegal' form should have surprised no one." Ngai, IMPOSSIBLE SUBJECTS at 261.

from a race-based policy to one that: "clearly institutionalized family reunion as the leading principle governing general immigration." *Id.*[99]

Congress extended its reach over the lives of aliens in the United States with the 1986 Immigration Reform and Control Act ("IRCA"). The Act established sanctions for employers who hired illegal aliens, providing a civil penalty of $250 to $2,000 for each worker hired and criminal penalties for a "pattern and practice" of illegal hiring, including a fine of up to $3,000 and six month prison sentences. Zolberg at 334. Such employers also had to verify the immigration status of all job applicants. *Id.* at 335. The Act also provided a means for illegal aliens to obtain amnesty by "apply[ing] for legal status within an

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[99] Congress has established other means by which potential immigrants can enter the country outside of the established immigration-regulation measures. The most prominent of these is asylum, "which offers permanent protection for aliens who fear future persecution, or who have suffered past persecution, in their home country." Patricia A. Seith, *Note: Escaping Domestic Violence: Asylum as a Means of Protection for Battered Women*, 97 COLUM. L.REV.. 1804, 1816 (1997). A person seeking asylum must file an application with Immigration and Customs Enforcement after arrival in the United States. *Id.* An officer reads the application and interviews the applicant. *Id.* If the applicant does not convince this officer to grant him asylum, he is generally referred to an immigration judge for removal. *Id.* at 1816-17. An applicant who faces an unfavorable decision can appeal to the Board of Immigration Appeals, and eventually to the federal courts. *Id.* at 1817. That process might take years. *Id.*

eighteenth-month period starting six months after the bill became law." *Id.* at 334.[100]

During the 1990s Congress implemented procedures to limit the rights of aliens to court review of administrative determinations of their status. The Anti-terrorism and Effective Death Penalty Act ("AEDPA") of 1996 "eliminated judicial review of deportation and exclusion orders for noncitizens convicted of 'aggravated felonies.'" Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings,* 29 Conn. L.Rev. 1411, 1412. The act also removed a long-established waiver of deportability for long-term lawful United States residents. *Id.* at 1412. That same year, Congress placed new restrictions on immigration and review of agency removal decisions in the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRAIRA"). *Id.* That legislation increased resources for enforcement of the immigration laws, made more aliens eligible for deportation or exclusion, limited agency discretion to change immigrants' status and increased the penalties for violating

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[100] Gloria Sandrino-Glasser describes the provisions of IRCA as: "(1) legalization of undocumented immigrants residing in the U.S. continuously since 1982; (2) sanctions for employers who hire undocumented aliens; (3) reimbursement of governments for added costs of legalization; (4) screening of welfare applicants for migration status; and (5) special programs to bring in agricultural laborers." Gloria Sandrino-Glasser, *Los Confundidos: De-Conflating Latinos/as' Race and Ethnicity,* 19 CHICANO-LATINO L.REV. 69 at n. 38.

immigration laws. Peter J. Spiro, *Learning to Live with Immigration Federalism,* 29 CONN. L.REV. 1627, 1633 (1997). That act also limited review of deportation orders in certain circumstances, particularly those who had been convicted of certain crimes or based their petition on certain "disfavored claims."[101] *Id.* at 1645.

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[101] The most important provisions of this act in relation to review of immigration status included "new, and more restrictive, procedures for the granting of discretionary waivers of removal on hardship grounds . . . new grounds of excludability (now called 'inadmissibility') and deportability, some of them designed to visit more lasting disabilities on former illegal aliens . . . substantially revised the procedures and criteria for granting asylum to refugees . . . made deep inroads on the availability of judicial review, both in individual cases and in class litigation . . . imposed massive reliance on detention of aliens who may be subject to removal . . . established new procedures for the 'expedited removal' of certain categories of arriving aliens . . . revised . . . benefits restrictions and affidavit of support procedures, and expanded the exclusion ground for aliens deemed likely to become a public charge." Gerald L. Neuman, *Symposium: Admissions and Denials: A Dialogic Introduction to the Immigration Law Symposium,* 29 CONN. L.REV. 1395, 1396-97 (1997). The IIRAIRA also permitted states to develop "pilot programs under which undocumented aliens are denied driver's licenses" and allowed the Attorney General of the United States "to deputize state and local authorities to enforce federal immigration law." Spiro at 1645. The Personal Responsibility Act, passed at around the same time as this other legislation, permitted "the states to extend certain benefits to aliens at their option. With respect to federally funded Medicare and what is colloquially known as 'welfare' (now called 'temporary assistance to needy families'), states may make independent determinations on the eligibility of legal resident aliens." *Id.* at 1637.

The history of federal regulation of immigration, then, is one of the creation of an intricate and complex bureaucracy that restricted who could immigrate to the United States and under what terms. Those immigration regulations have also come to define the conditions under which aliens can find employment in the country. The creation of this complex federal bureaucracy not only altered the role of the federal government in relation to immigration; it also transformed the status of immigrants in American society. A foreign-born person in the United States in 1870 had a presumptively legal status; no careful legal inquiry was required to determine whether that person had a right to reside in the country. By 1990, however, determining whether a foreign-born person enjoyed a legal right to remain in the United States demanded a detailed legal examination that involved numerous federal statutes, several adjudicatory bodies, and a number of appeals and exceptions. More than one hundred years of federal regulation have made the federal supremacy over immigration an intricate affair.

CITY OF HAZLETON, PENNSYLVANIA ILLEGAL IMMIGRATION RELIEF ACT ORDINANCE (Ordinance 2006-18, as amended by Ordinances 2006-40 and 2007-7)

ILLEGAL IMMIGRATION RELIEF ACT ORDINANCE
BE IT ORDAINED BY THE COUNCIL OF THE CITY OF HAZLETON AS FOLLOWS:

SECTION 1. TITLE

This chapter shall be known and may be cited as the "City of Hazleton Illegal Immigration Relief Act Ordinance."

SECTION 2. FINDINGS AND DECLARATION OF PURPOSE

The People of the City of Hazleton find and declare:

A. That state and federal law require that certain conditions be met before a person may be authorized to work or reside in this country.

B. That unlawful workers and illegal aliens, as defined by this ordinance and state and federal law, do not normally meet such conditions as a matter of law when present in the City of Hazleton.

C. That unlawful employment, the harboring of illegal aliens in dwelling units in the City of Hazleton, and crime committed by illegal aliens harm the health, safety and welfare of

authorized US workers and legal residents in the City of Hazleton. Illegal immigration leads to higher crime rates, subjects our hospitals to fiscal hardship and legal residents to substandard quality of care, contributes to other burdens on public services, increasing their cost and diminishing their availability to legal residents, and diminishes our overall quality of life.

D. That the City of Hazleton is authorized to abate public nuisances and empowered and mandated by the people of Hazleton to abate the nuisance of illegal immigration by diligently prohibiting the acts and policies that facilitate illegal immigration in a manner consistent with federal law and the objectives of Congress.

E. That United States Code Title 8, subsection 1324(a)(1)(A) prohibits the harboring of illegal aliens. The provision of housing to illegal aliens is a fundamental component of harboring.

F. This ordinance seeks to secure to those lawfully present in the United States and this City, whether or not they are citizens of the United States, the right to live in peace free of the threat crime, to enjoy the public services provided by this city without being burdened by the cost of providing goods, support and services to aliens unlawfully present in the United States, and to be free of the debilitating effects on their economic and social well being imposed by the influx of

illegal aliens to the fullest extent that these goals can be achieved consistent with the Constitution and Laws of the United States and the Commonwealth of Pennsylvania.

G. The City shall not construe this ordinance to prohibit the rendering of emergency medical care, emergency assistance, or legal assistance to any person.

SECTION 3. DEFINITIONS

When used in this chapter, the following words, terms and phrases shall have the meanings ascribed to them herein, and shall be construed so as to be consistent with state and federal law, including federal immigration law:

A. "Business entity" means any person or group of persons performing or engaging in any activity, enterprise, profession, or occupation for gain, benefit, advantage, or livelihood, whether for profit or not for profit.

(1) The term business entity shall include but not be limited to self-employed individuals, partnerships, corporations, contractors, and subcontractors.

(2) The term business entity shall include any business entity that possesses a business permit, any business entity that is exempt by law from obtaining such a business permit, and any business entity that is operating unlawfully without such a business permit.

B. "City" means the City of Hazleton.

C. "Contractor" means a person, employer, subcontractor or business entity that enters into an agreement to perform any service or work or to provide a certain product in exchange for valuable consideration. This definition shall include but not be limited to a subcontractor, contract employee, or a recruiting or staffing entity.

D. "Illegal Alien" means an alien who is not lawfully present in the United States, according to the terms of United States Code Title 8, section 1101 et seq. The City shall not conclude that a person is an illegal alien unless and until an authorized representative of the City has verified with the federal government, pursuant to United States Code Title 8, subsection 1373(c), that the person is an alien who is not lawfully present in the United States.

E. "Unlawful worker" means a person who does not have the legal right or authorization to work due to an impediment in any provision of federal, state or local law, including but not limited to a minor disqualified by nonage, or an unauthorized alien as defined by United States Code Title 8, subsection 1324a(h)(3).

F. "Work" means any job, task, employment, labor, personal services, or any other activity for which compensation is provided, expected, or due, including but not limited to all activities conducted by business entities.

G. "Basic Pilot Program" means the electronic verification of work authorization program of the Illegal Immigration Reform and Immigration Responsibility Act of 1996, P.L. 104-208, Division C, Section 403(a); United States Code Title 8, subsection 1324a, and operated by the United States Department of Homeland Security (or a successor program established by the federal government.)

SECTION 4. BUSINESS PERMITS, CONTRACTS, OR GRANTS

A. It is unlawful for any business entity to knowingly recruit, hire for employment, or continue to employ, or to permit, dispatch, or instruct any person who is an unlawful worker to perform work in whole or part within the City. Every business entity that applies for a business permit to engage in any type of work in the City shall sign an affidavit, prepared by the City Solicitor, affirming that they do not knowingly utilize the services or hire any person who is an unlawful worker.

B. Enforcement: The Hazleton Code Enforcement Office shall enforce the requirements of this section.

(1) An enforcement action shall be initiated by means of a written signed complaint to the Hazleton Code Enforcement Office submitted by any City official, business entity, or City resident. A valid complaint shall include an allegation which

describes the alleged violator(s) as well as the actions constituting the violation, and the date and location where such actions occurred.

(2) A complaint which alleges a violation on the basis of national origin, ethnicity, or race shall be deemed invalid and shall not be enforced.

(3) Upon receipt of a valid complaint, the Hazleton Code Enforcement Office shall, within three business days, request identity information from the business entity regarding any persons alleged to be unlawful workers. The Hazleton Code Enforcement Office shall suspend the business permit of any business entity which fails, within three business days after receipt of the request, to provide such information. In instances where an unlawful worker is alleged to be an unauthorized alien, as defined in United States Code Title 8, subsection 1324a(h)(3), the Hazleton Code Enforcement Office shall submit identity data required by the federal government to verify, pursuant to United States Code Title 8, section 1373, the immigration status of such person(s), and shall provide the business entity with written confirmation of that verification.

(4) The Hazleton Code Enforcement Office shall suspend the business permit of any business entity which fails correct a

violation of this section within three business days after notification of the violation by the Hazleton Code Enforcement Office.

(5) The Hazleton Code Enforcement Office shall not suspend the business permit of a business entity if, prior to the date of the violation, the business entity had verified the work authorization of the alleged unlawful worker(s) using the Basic Pilot Program.

(6) The suspension shall terminate one business day after a legal representative of the business entity submits, at a City office designated by the City Solicitor, a sworn affidavit stating that the violation has ended.

(a) The affidavit shall include a description of the specific measures and actions taken by the business entity to end the violation, and shall include the name, address and other adequate identifying information of the unlawful workers related to the complaint.

(b) Where two or more of the unlawful workers were verified by the federal government to be unauthorized aliens, the legal representative of the business entity shall submit to the Hazleton Code Enforcement Office, in addition to the prescribed affidavit, documentation acceptable to the

City Solicitor which confirms that the business entity has enrolled in and will participate in the Basic Pilot Program for the duration of the validity of the business permit granted to the business entity.

(7) For a second or subsequent violation, the Hazleton Code Enforcement Office shall suspend the business permit of a business entity for a period of twenty days. After the end of the suspension period, and upon receipt of the prescribed affidavit, the Hazleton Code Enforcement Office shall reinstate the business permit. The Hazleton Code Enforcement Office shall forward the affidavit, complaint, and associated documents to the appropriate federal enforcement agency, pursuant to United States Code Title 8, section 1373. In the case of an unlawful worker disqualified by state law not related to immigration, the Hazleton Code Enforcement Office shall forward the affidavit, complaint, and associated documents to the appropriate state enforcement agency.

C. All agencies of the City shall enroll and participate in the Basic Pilot Program.

D. As a condition for the award of any City contract or grant to a business entity for which the value of employment, labor or, personal services shall exceed $10,000, the business entity shall provide documentation

confirming its enrollment and participation in the Basic Pilot Program.

E. Private Cause of Action for Unfairly Discharged Employees

(1) The discharge of any employee who is not an unlawful worker by a business entity in the City is an unfair business practice if, on the date of the discharge, the business entity was not participating in the Basic Pilot program and the business entity was employing an unlawful worker.

(2) The discharged worker shall have a private cause of action in the Municipal Court of Hazleton against the business entity for the unfair business practice. The business entity found to have violated this subsection shall be liable to the aggrieved employee for:

(a) three times the actual damages sustained by the employee, including but not limited to lost wages or compensation from the date of the discharge until the date the employee has procured new employment at an equivalent rate of compensation, up to a period of one hundred and twenty days; and

(b) reasonable attorney's fees and costs.

SECTION 5. HARBORING ILLEGAL ALIENS

A. It is unlawful for any person or business entity that owns a dwelling unit in the City to harbor an illegal alien in the dwelling unit, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, unless such harboring is otherwise expressly permitted by federal law.

(1) For the purposes of this section, to let, lease, or rent a dwelling unit to an illegal alien, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, shall be deemed to constitute harboring. To suffer or permit the occupancy of the dwelling unit by an illegal alien, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, shall also be deemed to constitute harboring.

(2) A separate violation shall be deemed to have been committed on each day that such harboring occurs, and for each adult illegal alien harbored in the dwelling unit, beginning one business day after receipt of a notice of violation from the Hazleton Code Enforcement Office.

(3) A separate violation of this section shall be deemed to have been committed for each business day on which the owner

fails to provide the Hazleton Code Enforcement Office with identity data needed to obtain a federal verification of immigration status, beginning three days after the owner receives written notice from the Hazleton Code Enforcement Office.

B. Enforcement: The Hazleton Code Enforcement Office shall enforce the requirements of this section.

(1) An enforcement action shall be initiated by means of a written signed complaint to the Hazleton Code Enforcement Office submitted by any official, business entity, or resident of the City. A valid complaint shall include an allegation which describes the alleged violator(s) as well as the actions constituting the violation, and the date and location where such actions occurred.

(2) A complaint which alleges a violation on the basis of national origin, ethnicity, or race shall be deemed invalid and shall not be enforced.

(3) Upon receipt of a valid written complaint, the Hazleton Code Enforcement Office shall, pursuant to United States Code Title 8, section 1373(c), verify with the federal government the immigration status of a person seeking to use, occupy, lease, or rent a dwelling unit in the City. The Hazleton Code Enforcement Office shall submit identity data required by

the federal government to verify immigration status. The City shall forward identity data provided by the owner to the federal government, and shall provide the property owner with written confirmation of that verification.

(4) If after five business days following receipt of written notice from the City that a violation has occurred and that the immigration status of any alleged illegal alien has been verified, pursuant to United States Code Title 8, section 1373(c), the owner of the dwelling unit fails to correct a violation of this section, the Hazleton Code Enforcement Office shall deny or suspend the rental license of the dwelling unit.

(5) For the period of suspension, the owner of the dwelling unit shall not be permitted to collect any rent, payment, fee, or any other form of compensation from, or on behalf of, any tenant or occupant in the dwelling unit.

(6) The denial or suspension shall terminate one business day after a legal representative of the dwelling unit owner submits to the Hazleton Code Enforcement Office a sworn affidavit stating that each and every violation has ended. The affidavit shall include a description of the specific measures and actions taken by the business entity to end the violation, and shall include the name, address and

other adequate identifying information for the illegal aliens who were the subject of the complaint.

(7) The Hazleton Code Enforcement Office shall forward the affidavit, complaint, and associated documents to the appropriate federal enforcement agency, pursuant to United States Code Title 8, section 1373.

(8) Any dwelling unit owner who commits a second or subsequent violation of this section shall be subject to a fine of two hundred and fifty dollars ($250) for each separate violation. The suspension provisions of this section applicable to a first violation shall also apply.

(9) Upon the request of a dwelling unit owner, the Hazleton Code Enforcement Office shall, pursuant to United States Code Title 8, section 1373(c), verify with the federal government the lawful immigration status of a person seeking to use, occupy, lease, or rent a dwelling unit in the City. The penalties in this section shall not apply in the case of dwelling unit occupants whose status as an alien lawfully present in the United States has been verified.

SECTION 6. CONSTRUCTION AND SEVERABILITY

A. The requirements and obligations of this section shall be implemented in a manner fully consistent with federal law regulating immigration and protecting the civil rights of all citizens and aliens.

B. If any part of provision of this Chapter is in conflict or inconsistent with applicable provisions of federal or state statutes, or is otherwise held to be invalid or unenforceable by any court of competent jurisdiction, such part of provision shall be suspended and superseded by such applicable laws or regulations, and the remainder of this Chapter shall not be affected thereby.

SECTION 7. IMPLEMENTATION AND PROCESS

A. *Prospective Application Only.* The default presumption with respect to Ordinances of the City of Hazleton – that such Ordinances shall apply only prospectively – shall pertain to the Illegal Immigration Relief Act Ordinance. The Illegal Immigration Relief Act Ordinance shall be applied only to employment contracts, agreements to perform service or work, and agreements to provide a certain product in exchange for valuable consideration that are entered into or are renewed after the date that the Illegal Immigration Relief Act Ordinance becomes effective and any judicial injunction prohibiting its implementation is removed. The

Illegal Immigration Relief Act Ordinance shall be applied only to contracts to let, lease, or rent dwelling units that are entered into or are renewed after the date that the Illegal Immigration Relief Act Ordinance becomes effective and any judicial injunction prohibiting its implementation is removed. The renewal of a month-to-month lease or other type of tenancy which automatically renews absent notice by either party will not be considered as entering into a new contract to let, lease or rent a dwelling unit.

B. *Condition of Lease.* Consistent with the obligations of a rental unit owner described in Section 5.A., a tenant may not enter into a contract for the rental or leasing of a dwelling unit unless the tenant is either a U.S. citizen or an alien lawfully present in the United States according to the terms of United States Code Title 8, Section 1101 et seq. A tenant who is neither a U.S. citizen nor an alien lawfully present in the United States who enters into such a contract shall be deemed to have breached a condition of the lease under 68 P.S. Section 250.501. A tenant who is not a U.S. citizen who subsequent to the beginning of his tenancy becomes unlawfully present in the United States shall be deemed to have breached a condition of the lease under 68 P.S. Section 250.501.

C. *Corrections of Violations – Employment of Unlawful Workers.* The correction of a violation with respect to the employment of an

unlawful worker shall include any of the following actions:

(1) The business entity terminates the unlawful worker's employment.

(2) The business entity, after acquiring additional information from the worker, requests a secondary or additional verification by the federal government of the worker's authorization, pursuant to the procedures of the Basic Pilot Program. While this verification is pending, the three business day period described in Section 4.B.(4) shall be tolled.

(3) The business entity attempts to terminate the unlawful worker's employment and such termination is challenged in a court of the Commonwealth of Pennsylvania. While the business entity pursues the termination of the unlawful worker's employment in such forum, the three business day period described in Section 4.B.(4) shall be tolled.

D. *Corrections of Violations – Harboring Illegal Aliens*. The correction of a violation with respect to the harboring of an illegal alien in a dwelling unit shall include any of the following actions:

(1) A notice to quit, in writing, issued and served by the dwelling unit owner, as landlord, to the tenant declaring a forfeiture of the lease for breach of the lease condition describe in Section 7.B.

(2) The dwelling unit owner, after acquiring additional information from the alien, requests the City of Hazleton to obtain a secondary or additional verification by the federal government that the alien is lawfully present in the United States, under the procedures designated by the federal government, pursuant to United States Code Title 8, Subsection 1373(c). While this second verification is pending, the five business day period described in Section 5.B.(4) shall be tolled.

(3) The commencement of an action for the recovery of possession of real property in accordance with Pennsylvania law by the landlord against the illegal alien. If such action is contested by the tenant in court, the dwelling unit owner shall be deemed to have complied with this Ordinance while the dwelling unit owner is pursuing the action in court. While this process is pending, the five business day period described in Section 5.B.(4) shall be tolled.

E. *Procedure if Verification is Delayed.* If the federal government notifies the City of Hazleton that it is unable to verify whether a tenant is lawfully present in the United States or whether an employee is authorized to work in the United States, the City of Hazleton shall take no further action on the complaint until a verification from the federal government concerning the status of the individual is received. At no point shall any City official

attempt to make an independent determination of any alien's legal status, without verification from the federal government, pursuant to United States Code Title 8, Subsection 1373(c).

F. *Venue for Judicial Process.* Any business entity or rental unit owner subject to a complaint and subsequent enforcement under this ordinance, or any employee of such a business entity or tenant of such a rental unit owner, may challenge the enforcement of this Ordinance with respect to such entity or individual in the Magisterial District Court for the City of Hazleton, subject to the right of appeal to the Luzerne County Court of Common Pleas. Such an entity or individual may alternatively challenge the enforcement of this Ordinance with respect to such entity or individual in any other court of competent jurisdiction in accordance with applicable law, subject to all rights of appeal.

G. *Deference to Federal Determinations of Status.* The determination of whether a tenant of a dwelling is lawfully present in the United States, and the determination of whether a worker is an unauthorized alien shall be made by the federal government, pursuant to United States Code Title 8, Subsection 1373(c). A determination of such status of an individual by the federal government shall create a rebuttable presumption as to that individual's status in any judicial proceedings brought pursuant to this ordinance. The Court may take judicial

notice of any verification of the individual previously provided by the federal government and may request the federal government to provide automated or testimonial verification pursuant to United States Code Title 8, Subsection 1373(c).

CITY OF HAZLETON, PENNSYLVANIA RENTAL REGISTRATION ORDINANCE (Ordinance 2006-13)

ESTAB SHING A REGISTRATION PROGRAM FOR RESIDENTIAL RENTAL PROPERTIES; REQUIRING ALL OWNERS OF RESIDENTIAL RENTAL PROPERTIES TO DESIGNATE AN AGENT FOR SERVICE OF PROCESS; AND PRESCRIBING DUTIES OF OWNERS, AGENTS AND OCCUPANTS; DIRECTING THE DESIGNATION OF AGENTS; ESTABLISHING FEES FOR THE COSTS ASSOCIATED WITH THE REGISTRATION OF RENTAL PROPERTY; AND PRESCRIBING PENALTIES FOR VIOLATIONS

BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF HAZLETON AND IT IS HEREBY ORDAINED AND WITH THE AUTHORITY OF THE SAME AS FOLLOWS:

SECTION 1. DEFINITIONS AND INTERPRETATION.

The following words, when used in this ordinance, shall have the meanings ascribed to them in this section, except in those instances where the context clearly indicates otherwise. When not inconsistent with the context, words used in the present tense include the future; words in the plural number include the singular number; words in the singular shall include the plural, and words in the masculine shall include the feminine and the neuter.

a. AGENT – Individual of legal majority who has been designated by the Owner as the

agent of the Owner or manager of the Property under the provisions of this ordinance.

b. CITY – City of Hazleton

c. CITY CODE – the building code (property Maintenance Code 1996 as amended or superceded) officially adopted by the governing body of the City, or other such codes officially designated by the governing body of the City for the regulation of construction, alteration, addition, repair, removal, demolition, location, occupancy and maintenance of buildings and structures.

d. ZONING ORDINANCE – Zoning ordinance as officially adopted by the City of Hazleton, File of Council # 95-26 (as amended).

e. OFFICE – The Office of Code Enforcement for the City of Hazleton.

f. DWELLING UNIT – a single habitable unit, providing living facilities for one or more persons, including permanent space for living, sleeping, eating, cooking and bathing and sanitation, whether furnished or unfurnished. There may be more than one Dwelling Unit on a Premises.

g. DORMITORY – a residence hall offered as student or faculty housing to accommodate a college or university, providing living or sleeping rooms for individuals or groups of individuals, with or without cooking facilities and with or without private baths.

h. INSPECTOR – any person authorized by Law or Ordinance to inspect buildings or systems, e.g. zoning, housing, plumbing, electrical systems, heat systems, mechanical systems and health necessary to operate or use buildings within the City of Hazleton. An Inspector would include those identified in Section 8 – Enforcement.

i. FIRE DEPARTMENT – the Fire Department of the City of Hazleton or any member thereof, and includes the Chief of Fire or his designee.

j. HOTEL – a building or part of a building in which living and sleeping accommodations are used primarily for transient occupancy, may be rented on a daily basis, and desk service is provided, in addition to one or more of the following services: maid, telephone, bellhop service, or the furnishing or laundering of linens.

k. LET FOR OCCUPANCY – to permit, provide or offer, for consideration, possession or occupancy of a building, dwelling unit, rooming unit, premise or structure by a person who is not the legal owner of record thereof, pursuant to a written or unwritten lease, agreement or license, or pursuant to a recorded or unrecorded agreement or contract for the sale of land.

l. MOTEL – a building or group of buildings which contain living and sleeping accommodations used primarily for transient occupancy, may be rented on a daily basis, and

desk service is provided, and has individual entrances from outside the building to serve each such living or sleeping unit.

m. OCCUPANT – a person age 18 or older who resides at a Premises.

n. OPERATOR – any person who has charge, care or control of a Premises which is offered or let for occupancy.

o. OWNER – any Person, Agent, or Operator having a legal or equitable interest in the property; or recorded in the official records of the state, county, or municipality as holding title to the property; or otherwise having control of the property, including the guardian of the estate of any such person, and the executor or administrator of the estate of such person if ordered to take possession of real property by a Court of competent jurisdiction.

p. OWNER – OCCUPANT- an owner who resides in a Dwelling Unit on a regular permanent basis, or who otherwise occupies a non-residential portion of the Premises on a regular permanent basis.

q. PERSON – any person, partnership, firm, association, corporation, or municipal authority or any other group acting as a single unit.

r. POLICE DEPARTMENT – the Police Department of the City of Hazleton or any member thereof sworn to enforce laws and

ordinances in the City, and includes the Chief of Police or his designee.

s. PREMISES – any parcel of real property in the City, including the land and all buildings and structures in which one or more Rental Units are located.

t. RENTAL UNIT – means a Dwelling Unit or Rooming Unit which is Let for Occupancy and is occupied by one or more Tenants.

u. ROOMING UNIT – any room or groups of rooms forming a single habitable unit occupied or intended to be occupied for sleeping or living, but not for cooking purposes.

v. TENANT – any Person authorized by the Owner or Agent who occupies a Rental Unit within a Premises regardless of whether such Person has executed a lease for said Premises.

SECTION 2. APPOINTMENT OF AN AGENT AND/OR MANAGER

Each Owner who is not an Owner-occupant, or who does not reside in the City of Hazleton or within a ten (10) mile air radius of the City limits, shall appoint an Agent who shall reside in the City or within a ten (10) mile air radius of the City limits.

SECTION 3. DUTIES OF THE OWNER AND/OR AGENT

a. The Owner has the duty to maintain the Premises in good repair, clean and sanitary condition, and to maintain the Premises in compliance with the current Codes, Building Codes and Zoning Ordinance of the City of Hazleton. The Owner may delegate implementation of these responsibilities to an Agent.

b. The duties of the Owner and/or Agent shall be to receive notices and correspondence, including service of process, from the City of Hazleton; to arrange for the inspection of the Rental Units; do or arrange for the performance of maintenance, cleaning, repair, pest control, snow and ice removal, and ensure continued compliance of the Premises with the current Codes, Building Codes and Zoning Ordinance in effect in the City of Hazleton, as well as arrange for garbage removal.

c. The name, address and telephone number of the Owner and Agent, if applicable, shall be reported to the Code Enforcement Office in writing upon registering the Rental Units.

d. No Dwelling Unit shall be occupied, knowingly by the Owner or Agent, by a number of persons that is in excess of the requirements outlined in 2003 International Property Maintenance Code, Chapter 4, Light, Ventilation, and Occupancy Limits, Section PM-404.5, Overcrowding, or any update thereof,

a copy of which is appended hereto and made a part hereof.

SECTION 4. NOTICES

a. Whenever an Inspector or Code Enforcement Officer determines that any Rental Unit or Premises fails to meet the requirements set forth in the applicable Codes, the Inspector or Code Enforcement Officer shall issue a correction notice setting forth the violations and ordering the Occupant, Owner or Agent, as appropriate, to correct such violations. The notice shall:

   1) Be in writing;

   2) Describe the location and nature of the violation;

   3) Establish a reasonable time for the correction of the violation.

b. All notices shall be served upon the Occupant, Owner or Agent, as applicable, personally or by certified mail, return receipt requested. A copy of any notices served solely on an Occupant shall also be provided to the Owner or Agent. In the event service is first attempted by mail and the notice is returned by the postal authorities marked "unclaimed" or "refused", then the Code Enforcement Office or Police Department shall attempt delivery by personal service on the Occupant, Owner or Agent, as applicable. The Code Enforcement Office shall also post the notice at a conspicuous place on the

Premises. If personal service directed to the Owner or Agent cannot be accomplished after a reasonable attempt to do so, then the notice may be sent to the Owner or Agent, as applicable, at the address stated on the most current registration application for the Premises in question, by regular first class mail, postage prepaid. If such notice is not returned by the postal authorities within five (5) days of its deposit in the U.S. Mail, then it shall be deemed to have been delivered to and received by the addressee on the fifth day following its deposit in the United States Mail.

c. For purposes of this Ordinance, any notice hereunder that is given to the Agent shall be deemed as notice given to the Owner.

d. There shall be a rebuttable presumption that any notice that is given to the Occupant, Owner or Agent under this ordinance shall have been received by such Occupant, Owner or Agent if the notice was served in the manner provided by this ordinance.

e. Subject to paragraph 4.d above, a claimed lack of knowledge by the Owner or Agent, if applicable, of any violation hereunder cited shall be no defense to closure of rental units pursuant to Section 9, as long as all notices prerequisite to such proceedings have been given and deemed received in accordance with the provisions of this ordinance.

f. All notices shall contain a reasonable time to correct, or take steps to correct, violations of

the above. The Occupant, Owner or Agent to whom the notice was addressed may request additional time to correct violations. Requests for additional time must be in writing and either deposited in the U.S. Mail (postmarked) or hand delivered to the Code Enforcement Office within five (5) days of receipt of the notice by the Occupant, Owner or Agent. The City retains the right to deny or modify time extension requests. If the Occupant, Owner or Agent is attempting in good faith to correct violations but is unable to do so within the time specified in the notice, the Occupant, Owner or Agent shall have the right to request such additional time as may be needed to complete the correction work, which request shall not be unreasonably withheld.

g. Failure to correct violations within the time period stated in the notice of violation shall result in such actions or penalties as are set forth in Section 10 of this ordinance. If the notice of violation relates to actions or omissions of the Occupant, and the Occupant fails to make the necessary correction, the Owner or Agent may be required to remedy the condition. No adverse action shall be taken against an Owner or Agent for failure to remedy a condition so long as the Owner or Agent is acting with due diligence and taking bona fide steps to correct the violation, including but not limited to pursuing remedies under a lease agreement with an Occupant or Tenant. The City shall not be precluded from pursuing an enforcement action against

any Occupant or Tenant who is deemed to be in violation.

SECTION 5. INSURANCE

In order to protect the health, safety and welfare of the residents of the City, it is hereby declared that the city shall require hazard and general liability insurance for all property owners letting property for occupancy in the City.

a. Minimum coverage; use of insurance proceeds. All Owners shall be required to obtain a minimum of fifty thousand ($50,000.00) dollars in general liability insurance, and hazard and casualty insurance in an amount sufficient to either restore or remove the building in the event of a fire or other casualty. Further, in the event of any fire or loss covered by such insurance, it shall be the obligation of the Owner to use such insurance proceeds to cause the restoration or demolition or other repair of the property in adherence to the City Code and all applicable ordinances.

b. Property owners to provide City with insurance information. Owners shall be required to place their insurance company name, policy number and policy expiration date on their Rental Property Registration form, or in the alternative, to provide the Code Enforcement Office with a copy of a certificate of insurance. A registration Certificate (see Section 6 below) shall not be issued to any

Owner or Agent unless the aforementioned information has been provided to the Code Enforcement Office. The Code Enforcement Office shall be informed of any change in policies for a particular rental property or cancellation of a policy for said property within thirty (30) days of said change or cancellation.

SECTION 6. RENTAL REGISTRATION AND LICENSE REQUIREMENTS

a. No Person shall hereafter occupy, allow to be occupied, advertise for occupancy, solicit occupants for, or let to another person for occupancy any Rental Unit within the City for which an application for license has not been made and filed with the Code Enforcement Office and for which there is not an effective license. Initial application and renewal shall be made upon forms furnished by the Code Enforcement Office for such purpose and shall specifically require the following minimum information:

1) Name, mailing address, street address and phone number of the Owner, and if the Owner is not a natural person, the name, address and phone number of a designated representative of the Owner.

2) Name, mailing address, street address and phone number of the Agent of the Owner, if applicable.

3) The street address of the Premises being registered.

4) The number and types of units within the Premises (Dwelling Units or Rooming Units) The Owner or Agent shall notify the Code Enforcement Office of any changes of the above information within thirty (30) days of such change.

b. The initial application for registration and licensing shall be made by personally filing an application with the Code Enforcement Office by November 1, 2006. Thereafter, any new applicant shall file an application before the Premises is let for occupancy, or within thirty (30) days of becoming an Owner of a currently registered Premises. One application per property is required, as each property will receive its own license.

c. Upon receipt of the initial application or any renewal thereof and the payment of applicable fees as set forth in Section 7 below, the Code Enforcement Office shall issue a Rental Registration License to the Owner within thirty (30) days of receipt of payment.

d. Each new license issued hereunder, and each renewal license, shall expire on October 31 of each year. The Code Enforcement Office shall mail license renewal applications to the Owner or designated Agent on or before September 1 of each year. Renewal applications and fees may be returned by mail or in person to the Code Enforcement Office. A renewal license will not be issued unless the

application and appropriate fee has been remitted.

SECTION 7. FEES.

a. Annual License Fee. There shall be a license fee for the initial license and an annual renewal fee thereafter. Fees shall be assessed against and payable by the Owner in the amount of $5.00 per Rental Unit, payable at the time of initial registration and annual renewal, as more specifically set forth in Section 6 above.

b. Occupancy Permit Fee. There shall be a one-time occupancy permit fee of $10.00 for every new Occupant, which is payable by the Occupant. For purposes of initial registration under this ordinance, this fee shall be paid for all current Occupants by November 1, 2006. Thereafter, prior to occupying any Rental Unit, all Occupants shall obtain an occupancy permit. It shall be the Occupant's responsibility to submit an occupancy permit application to the Code Enforcement Office, pay the fee and obtain the occupancy permit. If there are multiple Occupants in a single Rental Unit, each Occupant shall obtain his or her own permit. Owner or Agent shall notify all prospective Occupants of this requirement and shall not permit occupancy of a Rental Unit unless the Occupant first obtains an occupancy permit. Each occupancy permit issued is valid only for the Occupant for as long as the Occupant continues to

occupy the Rental Unit for which such permit was applied. Any relocation to a different Rental Unit requires a new occupancy permit. All Occupants age 65 and older, with adequate proof of age, shall be exempt from paying the permit fee, but shall be otherwise required to comply with this section and the rest of the Ordinance.

1. Application for occupancy permits shall be made upon forms furnished by the Code Enforcement Office for such purpose and shall specifically require the following minimum information:

    a) Name of Occupant

    b) Mailing address of Occupant

    c) Street address of Rental Unit for which Occupant is applying, if different from mailing address

    d) Name of Landlord

    e) Date of lease commencement

    f) Proof of age if claiming exemption from the permit fee

    g) Proper identification showing proof of legal citizenship and/or residency

2. Upon receipt of the application and the payment of applicable fees as set forth above, the Code Enforcement Office shall issue an Occupancy Permit to the Occupant immediately.

SECTION 8. ENFORCEMENT

a. The following persons are hereby authorized to enforce this Ordinance:

   1. The Chief of Police
   2. Any Police Officer
   3. Code Enforcement Officer
   4. The Fire Chief
   5. Deputy Fire Chief of the City of Hazleton.
   6. Health Officer
   7. Director of Public Works

b. The designation of any person to enforce this Ordinance or authorization of an Inspector, when in writing, and signed by a person authorized by Section 8.a to designate or authorize an Inspector to enforce this Ordinance, shall be prima facie evidence of such authority before the Magisterial District Judge, Court of Common Pleas, or any other Court, administrative body of the City, or of this commonwealth, and the designating Director or Supervisor need not be called as a witness thereto.

SECTION 9. FAILURE TO CORRECT VIOLATIONS.

If any Person shall fail, refuse or neglect to comply with a notice of violation as set forth in Section 4 above, the City shall have the right to file an

enforcement action with the Magisterial District Judge against any Person the City deems to be in violation. If, after hearing, the Magisterial District Judge determines that such Person or Persons are in violation, the Magisterial District Judge may, at the City's request, order the closure of the Rental Unit(s), or assess fines in accordance with Section 10 below, until such violations are corrected. Such order shall be stayed pending any appeal to the Court of Common Pleas of Luzerne County.

SECTION 10. FAILURE TO COMPLY WITH THIS ORDINANCE; PENALTIES

a. Except as provided in subsections 10.b and 10.c below, any Person who shall violate any provision of the Ordinance shall, upon conviction thereof after notice and a hearing before the Magisterial District Judge, be sentenced to pay a fine of not less than $100.00 and not more than $300.00 plus costs, or imprisonment for a term not to exceed ninety (90) days in default of payment. Every day that a violation of this Ordinance continues shall constitute a separate offense, provided, however, that failure to register or renew or pay appropriate fees in a timely manner shall not constitute a continuing offense but shall be a single offense not subject to daily fines.

b. Any Owner or Agent who shall allow any Occupant to occupy a Rental Unit without first obtaining an occupancy permit is in violation

of Section 7.b and shall, upon conviction thereof after notice and a hearing before the Magisterial District Judge, be sentenced to pay a fine of $1,000 for each Occupant that does not have an occupancy permit and $100 per Occupant per day for each day that Owner or Agent continues to allow each such Occupant to occupy the Rental Unit without an occupancy permit after Owner or Agent is given notice of such violation pursuant to Section 4 above. Owner or Agent shall not be held liable for the actions of Occupants who allow additional occupancy in any Rental Unit without the Owner or Agent's written permission, provided that Owner or Agent takes reasonable steps to remove or register such unauthorized Occupant(s) within ten (10) days of learning of their unauthorized occupancy in the Rental Unit.

c. Any Occupant having an occupancy permit but who allows additional occupancy in a Rental Unit without first obtaining the written permission of the Owner or Agent and without requiring each such additional Occupant to obtain his or her own occupancy permit is in violation of Section 7.b of this ordinance and shall, upon conviction thereof after notice and a hearing before the Magisterial District Judge, be sentenced to pay a fine of $1,000 for each additional Occupant permitted by Occupant that does not have an occupancy permit and $100 per additional Occupant per day for each day that Occupant continues to allow each such additional Occupant to occupy the Rental Unit without an

occupancy permit after Occupant is given written notice of such violation by Owner or Agent or pursuant to Section 4 above.

SECTION 11. APPLICABILITY AND EXEMPTIONS TO THE ORDINANCE

The provisions of the ordinance shall not apply to the following properties, which are exempt from registration and license requirements:

a. Hotels, Motels and Dormitories.

b. Rental Units owned by Public Authorities as defined under the Pennsylvania Municipal Authorities Act, and Dwelling Units that are part of an elderly housing multi-unit building which is 75% occupied by individuals over the age of sixty-five.

c. Multi-dwelling units that operate under Internal Revenue Service Code Section 42 concerning entities that operate with an elderly component.

d. Properties which consist of a double home, half of which is let for occupancy and half of which is Owner-occupied as the Owner's residence.

SECTION 12. CONFIDENTIALITY OF INFORMATION

All registration information collected by the City under this Ordinance shall be maintained as confidential and shall not be disseminated or released to

any individual, group or organization for any purpose except as provided herein or required by law. Information may be released only to authorized individuals when required during the course of an official City, state or federal investigation or inquiry.

SECTION 13. SAVING CLAUSE

This ordinance shall not affect violations of any other ordinance, code or regulation

existing prior to the effective date thereof and any such violations shall be governed and shall continue to be punishable to the full extent of the law under the provisions of those ordinances, codes or regulations in effect at the time the violation was committed.

SECTION 14. SEVERABILITY

If any section, clause, provision or portion of this Ordinance shall be held invalid or unconstitutional by any Court of competent jurisdiction, such decision shall not affect any other section, clause, provision or portion of this Ordinance so long as it remains legally enforceable without the invalid portion. The City reserves the right to amend this Ordinance or any portion thereof from time to time as it shall deem advisable in the best interest of the promotion of the purposes and intent of this Ordinance, and the effective administration thereof.

SECTION 15. EFFECTIVE DATE

This Ordinance shall become effective immediately upon approval. This Ordinance repeals Ordinance number 2004-11 and replaces same in its entirety.

SECTION 16.

This Ordinance is enacted by the Council of the City of Hazleton under the authority of the Act of Legislature, April 13, 1972, Act No. 62, known as the "Home Rule Charter and Optional Plans Law", and all other laws enforceable the State of Pennsylvania.

Supreme Court, U.S.
FILED
FEB 9 - 2011
OFFICE OF THE CLERK

No. 10-772

IN THE

Supreme Court of the United States

CITY OF HAZLETON, PENNSYLVANIA,

Petitioner,

—v.—

PEDRO LOZANO, *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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CORPORATE DISCLOSURE STATEMENT

None of the respondents is a corporation that has issued shares to the public, nor is any a parent corporation, a subsidiary, or affiliate of corporations that have done so.

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INTRODUCTION

This case is a challenge to Hazleton, Pennsylvania's municipal ordinances regulating immigrant employment and housing. After four months of discovery and a nine day bench trial, the district court found the ordinances invalid in their entireties and issued a permanent injunction. The court of appeals affirmed the injunction in virtually all respects, separately addressing the employment and housing provisions and finding both sets of provisions preempted.[1] Hazleton's petition presents questions relating to both the employment (Question 1) and the housing (Questions 2 and 3) provisions of the ordinances.

The employment and housing provisions raise different *certiorari* considerations, but neither merits review at this time. On the employment provisions, the main issue is how this petition should be handled in light of the pendency of *Chamber of Commerce v. Whiting*, No. 09-115, which is a preemption challenge to Arizona's immigrant employment regulations. This case and *Whiting* both involve express and conflict preemption claims. The express preemption claim and some of the conflict preemption claims here are similar to those in *Whiting*. But there are also conflict preemption issues raised in this case that are distinct from those in *Whiting* and were

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[1] The court of appeals vacated the injunction with respect to one distinct employment-related provision on standing grounds. That issue is not before this Court.

correctly decided below. Therefore, the Court can and should deny review of the employment provisions now.

The housing provisions plainly do not warrant the Court's review. Courts have unanimously rejected attempts to enact restrictive immigrant housing regulations like Hazleton's. Moreover, this case does not involve any conflict regarding the proper interpretation of the federal criminal harboring statute, 8 U.S.C. § 1324(a)(1), and is not an appropriate vehicle for resolving any genuine questions that may exist as to that statute's scope.

STATEMENT OF THE CASE

1. In 2006, Hazleton enacted two municipal ordinances that regulate employment and housing based on immigration status: the Illegal Immigration Relief Act Ordinance ("IIRAO"),[2] Pet. App. 350, and the Rental Registration Ordinance ("RO"), *id.* at 369.

Both ordinances were enacted in response to an increase in Hazleton's population since 2000, much of which was due to Latino families who had moved to Hazleton from New York and New Jersey. *Id.* at 4. Believing that many of these newcomers were non-citizens who lacked lawful immigration status, and having concluded "that the federal

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[2] Hazleton amended the IIRAO on numerous occasions in the course of the litigation, including during the trial. Pet. App. 6 n.2. Both the district court and court of appeals rulings are based on the current iteration of the ordinance.

government could not be relied upon to prevent such aliens from moving into the City, or to remove them," *id.* at 5-6, Hazleton took matters into its own hands.[3]

Hazleton's employment provisions are found in the IIRAO. The ordinance is written broadly to prohibit anyone from knowingly engaging, directing, or permitting an unauthorized worker to perform any act or task for which the worker expects or is provided compensation. IIRAO § 4.A. Any resident or municipal employee may file a complaint with the City alleging a worker is unauthorized. *Id.* § 4.B(1). The Hazleton Code Enforcement Office must then demand that the employer produce identification documents for the worker. *Id.* § 4.B(3).

If the employer fails to produce the documents within three days or the Code Enforcement Office confirms that a worker lacks authorization to work in the United States, Hazleton suspends the employer's business license, forcing closure of the entire business. *Id.* § 4.B(3)-(4). For a first offense, the closure terminates one business day after the employer submits an affidavit stating that the violation has ended and providing certain other information. *Id.* § 4.B(6). For a subsequent offense, the closure lasts a minimum of twenty days. *Id.* § 4.B(7).

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[3] The trial included extensive testimony from both sides about the extent and effects of unauthorized immigration in Hazleton. The district court made no factual findings based on this testimony and the Court of Appeals carefully sidestepped the "hotly contest[ed]" issue. Pet. App. 7 n.3.

The federal E-Verify system plays an important role in Hazleton's employment scheme. E-Verify, which was previously known as "Basic Pilot," is a voluntary, temporary and experimental federal electronic employment verification system. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, Div. C., § 402(a), 110 Stat. 3009.[4] The IIRAO requires employers to use E-Verify if they have employed more than one unauthorized worker. IIRAO § 4.B(6)(b). It provides a safe harbor from its penalties for employers who use E-Verify. *Id.* § 4.B(5). The ordinance also requires employers who seek significant City contracts and grants to use E-Verify. *Id.* § 4.D.

Hazleton's housing provisions are contained in both the IIRAO and the RO. The IIRAO makes it illegal to "harbor" an "illegal alien." As defined by Hazleton, harboring means to knowingly "let, lease or rent a dwelling unit to" or "suffer or permit the occupancy of the dwelling unit by" an "alien who is not lawfully present in the United States." *Id.* §§ 5.A(1), 3.D. An alien who is not "lawfully present" and enters into a lease is "deemed to have breached a condition of the lease." *Id.* § 7.B

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[4] As the court of appeals recognized, "E-Verify also has significant problems" that explain Congress' choice to keep it voluntary and temporary, rather than mandatory. Pet. App. 101; *see also id.* at 98-100; C.A. App. A1510-24 (expert testimony regarding problems with E-Verify system).

The IIRAO's enforcement provisions for housing are similar to those for employment. Any resident or City employee may file a complaint, which triggers an investigation. *Id.* § 5.B(1). If the landlord (or other suspected violator) either fails to produce documentation regarding the resident who is the subject of the complaint, or the resident is determined to be "not lawfully present," the landlord must evict the resident or lose her rental license. *Id.* § 5.B(3)-(4).

The IIRAO's housing provisions are supplemented by the RO, which requires any prospective tenant age eighteen or over to apply for and receive an occupancy permit from the City. RO § 6.a–b. A tenant must submit certain documents to receive a permit, including "proper identification showing proof of legal citizenship and/or residency." *Id.* § 7.b.1. Any landlord or tenant who allows a person without an occupancy permit to stay in a dwelling is subject to at least a $1,000 fine. *Id.* § 10.b.

2. A group of business entities, landlords, tenants and nonprofit Latino organizations filed suit in the district court claiming that the IIRAO and RO violate the Supremacy Clause and other federal constitutional and statutory provisions, as well as Pennsylvania state law. Pet. App. 16. The district court granted Plaintiffs a temporary restraining order enjoining the ordinances' enforcement. *Id.* After a four month discovery period, *id.* at 164, the court conducted a nine day bench trial, *id.* at 16, that

featured testimony by the plaintiffs, various Hazleton officials and a half-dozen expert witnesses.

In July 2007, the district court issued a 206-page decision permanently enjoining the IIRAO and RO on multiple grounds. *Id.* at 159-388. The court found that the employment and the housing provisions are both preempted and thus invalid.

On the employment provisions, the court first explained that Hazleton's scheme is expressly prohibited by 8 U.S.C. § 1324a(h)(2), a provision of the Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603, 100 Stat. 3359, that "preempt[s] any State or local law imposing civil or criminal sanctions (other than through licensing or similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." The district court rejected Hazleton's argument that the IIRAO's employment provisions constitute a "licensing or similar law[]" within § 1324a(h)(2)'s parenthetical savings clause, describing it as "counterintuitive to the plain language of the provision" because "[i]t would not make sense for Congress . . . to allow states and municipalities the opportunity to provide the ultimate sanction, but no lesser penalty." Pet. App. 246. The court explained that its conclusion is supported by the legislative history of § 1324a(h)(2), which demonstrates that the parenthetical exception applies to "fitness to do business laws" and sanctions predicated on a federal finding that an employer has knowingly hired an unauthorized worker. *Id.* at 246-48.

The district court additionally and independently found that the employment provisions are impliedly preempted by federal law under both field and conflict preemption theories. The court found that the federal government had occupied the field of unauthorized alien employment regulation to the exclusion of IIRAO's employment provisions. *Id.* at 250-60. The district court also identified multiple conflicts between the Hazleton law and the federal employer sanctions scheme enacted in IRCA. These include Hazleton's imposition of employment verification via its Code Enforcement Office, in contrast to the federal processes prescribed by IRCA; the fact that Hazleton's scheme encompasses workers, such as independent contractors and casual domestic workers, specifically excepted from verification under federal law; Hazleton's requirement that certain employers participate in E-Verify; and the different balances that the two schemes strike between protecting "the rights of businesses and workers" and "preventing illegal employment." *Id.* at 261-70.

Finally, the district court found that the housing provisions of the IIRAO and RO also conflict with federal law and are therefore preempted. *Id.* at 273-79. Explaining that both ordinances are premised on incorrect assumptions about the operation of federal immigration law, the district court held that the ordinances impermissibly "prohibit[] [aliens] from residing in the city although they may be permitted to remain in the United States." *Id.* at 278-79.

3. In September 2010, a unanimous Third Circuit panel issued a lengthy opinion affirming the district court's judgment.[5]

a. Like the district court, the court of appeals found that the employment provisions are conflict preempted because they "stand as an obstacle to the accomplishment and execution of federal law." Pet. App. 88. The court of appeals identified "at least" four sets of conflicts, *id.* at 92, which significantly disrupt the federal employer sanctions scheme established by IRCA.

First, the court of appeals found that the IIRAO establishes a separate and independent local adjudicative system for determining whether an employer has hired unauthorized aliens. *Id.* Hazleton's system conflicts with federal law because it deprives employers of the procedures and protections available to them under IRCA. *Id.* at 92-94. Moreover, "the fact that Hazleton has established an alternative system *at all*" burdens employers by subjecting them to "two separate systems . . . ." *Id.* at 94 (emphasis in original). Congress did not intend to subject employers to a "patchwork of state and local systems each independently monitoring, investigating, and ultimately deciding—all concurrently with the

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[5] The court of appeals rejected Hazleton's challenges to plaintiffs' standing, except as to a distinct provision in the IIRAO establishing a private cause of action. Pet. App. 18-49. *See supra* n.1.

federal government—whether employers have hired unauthorized aliens." *Id.* at 95.

Second, the court of appeals recognized that Hazleton's employment provisions alter the employment verification scheme that is the linchpin of IRCA—commonly referred to as the "I-9 process"—in two ways. *Id.* at 96-97. They eliminate the safe harbor provided by federal law for employers who comply in good faith with the I-9 process. *Id.* at 96. Further, they coerce or, in some cases, mandate employers to participate in the federal E-Verify system, which Congress intended to "remain fully voluntary for the vast majority of employers . . . ." *Id.* at 97.

Third, the court of appeals found that IIRAO expands employers' verification obligations to encompass independent contractors, "even though Congress purposely excluded independent contractors from IRCA's verification requirements." *Id.* at 101-04.

Fourth, the court of appeals found that the IIRAO's failure to provide offsetting anti-discrimination protections for work-authorized aliens "place[s] all of its weight on one side of the regulatory scale," drastically upsetting the balance that Congress carefully struck in IRCA. *Id.* at 104-09.

The court of appeals did not find the employment provisions expressly preempted. On that issue, the court of appeals departed from the district court's analysis, instead adopting a broader

reading of § 1324a(h)(2)'s parenthetical savings clause for "licensing and similar laws" that would encompass Hazleton's employment provisions if those provisions were viewed in isolation. *Id.* at 79-84. The court of appeals also noted, however, the "significant force" of the argument that the IIRAO is "not a bona fide licensing law," but instead "should be viewed as part of a scheme intended to regulate immigration by keeping all persons lacking lawful immigration status out of the City, and by supplanting the federal government's role in these matters." *Id.* at 84 n.31. The court noted that the record contained evidence to support that "very troubling" theory, but ultimately declined to resolve the question, given its holding that the employment provisions are conflict preempted. *Id.*

b. The court of appeals next found that the housing provisions violate the Supremacy Clause under all three tests set forth by this Court in *De Canas v. Bica*, 424 U.S. 351 (1976). First, the court explained that the housing provisions "attempt[] to regulate residence based solely on immigration status." Pet. App. 111. Thus, they impermissibly "regulate immigration," a power reserved exclusively to the federal government under the Constitution. *Id.* Second, the housing provisions are field preempted because "'the comprehensiveness of the [Immigration and Nationality Act's] scheme for regulation of immigration and naturalization' . . . plainly precludes state efforts, whether harmonious or conflicting, to regulate residence in this country based on immigration status." *Id.* at 112 (quoting *De*

Canas, 424 U.S. at 359). Third, the housing provisions are conflict preempted because they "attempt to effectively 'remove' persons from Hazleton based on a snapshot of their current immigration status, rather than based on a federal order of removal." *Id.* at 114. The court explained that under federal law, "unlawful immigration status does not lead instantly, or inevitably, to removal," for a number of reasons including the availability of relief from removal in federal immigration proceedings. *Id.* at 115-17.

REASONS TO DENY THE PETITION

I. *Certiorari* on the Employment Provisions Can Be Denied Now

A. Hazleton's Scheme Presents Several Fatal Conflicts With Federal Law That Are Not At Issue in *Whiting*

Whatever the outcome in *Chamber of Commerce v. Whiting*, the petition in this case can and should be denied. There is thus no need to hold this petition pending a final decision in *Whiting*.

To be sure, there is significant overlap in the preemption issues raised by Hazleton's employment provisions and those raised by the Arizona law at issue in *Whiting*. In both cases, the express preemption analysis turns on the interpretation of the parenthetical savings clause in 8 U.S.C. § 1324a(h)(2). Moreover, the Arizona and Hazleton laws present some of the same conflicts, such as

depriving employers of the ability guaranteed under federal law to choose whether to participate in E-Verify.[6] Therefore, the Court's decision in *Whiting* could foreclose petitioner's appeal on the employment provisions, and the Court should not even consider granting this petition before deciding *Whiting*.

But the Court need not resolve *Whiting* before *denying* this petition. Hazleton's employment provisions present several additional, significant conflicts with federal law that were correctly decided below and would justify denial of this petition even if the Court were to find that the Arizona law is not preempted, including the following:

1. Hazleton's employment provisions deprive employers of a critical protection provided in IRCA: a defense for good-faith compliance with the I-9 process. *Cf.* Ariz. Rev. Stat. § 23-212(J) (purporting to provide such defense).[7]

IRCA fundamentally changed immigration law by comprehensively regulating—for the first time—the employment of aliens. It imposed penalties on

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[6] The Third Circuit concluded that petitioner had waived any claim that Hazleton's employment provisions (other than the private right of action) were severable, Pet. App. 18-20 & n.13, a holding that petitioner does not challenge here. Thus, a conflict with respect to the E-Verify provisions would void all of the employment provisions at issue.

[7] Whether that defense is actually available to Arizona employers given that federal law explicitly precludes the use of I-9 information for purposes other than enforcement of certain federal statutes, 8 U.S.C. § 1324a(b)(5), is a separate question.

those who employ unauthorized aliens, and established a uniform federal system for verifying work authorization of new hires. As the Third Circuit explained, "Congress went to considerable lengths in enacting IRCA to achieve a careful balance among its competing policy objectives": deterring unauthorized employment, minimizing employer burden, and preventing discrimination. Pet. App. 88 (citing *Chamber of Commerce v. Edmonson*, 594 F.3d 742, 767 (10th Cir. 2010)).

That balance is apparent in IRCA's I-9 process, which established a uniform system for employer verification of the work authorization status of new hires. The I-9 process limits the potential burden on employers by requiring them only to ensure that any relevant document submitted by the employee "reasonably appears on its face to be genuine." 8 U.S.C. § 1324a(b)(1)(A)(ii); *see Collins Foods Int'l, Inc. v. INS*, 948 F.2d 549, 554 (9th Cir. 1991) ("Congress intended to minimize the burden and the risk placed on the employer in the verification process."); Pet. App. 90-91. Employers who can demonstrate good faith compliance with the I-9 process are entitled to an affirmative defense against a charge that they knowingly hired an unauthorized alien. 8 U.S.C. § 1324a(a)(3).

In direct contrast, the IIRAO overrides the I-9 system, disregarding its carefully crafted protections and imposing draconian penalties upon businesses even if they have complied with federal procedures. Under Hazleton's provisions, an employer who

follows federal law by examining a new hire's I-9 documents and determining that they reasonably appear genuine is *not* entitled to a safe harbor, contrary to Congress' intent. Rather, at any point, Hazleton officials or residents may initiate a complaint-driven procedure that requires the employer to provide "identity information" for the challenged employee and subjects the employer to sanctions based on a database query. IIRAO § 4.B(3).

By depriving employers of the safe harbor to which they are entitled under federal law, the IIRAO drastically alters the system of costs and benefits constructed by Congress. The Hazleton ordinance creates a strong incentive for employers to look behind the I-9 documents proffered by workers, to continuously reverify individuals' work authorization status, and to avoid hiring workers that appear to be non-citizens, even if their papers are valid. That is not consistent with the balance Congress carefully struck when it enacted IRCA. *See* S. Rep. No. 99-132, at 8-9 (1985) (describing "imperative" need for a "formal, effective verification system combined with an affirmative defense for those [employees] who in good faith follow the proper procedure," so that employers do not "seek to avoid penalties by avoiding persons they suspect might be illegal aliens").[8]

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[8] Petitioner suggests that conflict preemption does not exist where a local law undermines a balance that Congress carefully struck in a federal statute. Pet. Br. 22-24. That is simply incorrect. *See, e.g., Buckman Co. v. Pls.' Legal Comm.*, 531 U.S.

2. By imposing penalties on employers without a hearing or a finding by a neutral decisionmaker, Hazleton's employment provisions also deny employers procedural safeguards that Congress deemed critical. *Cf.* Ariz. Rev. Stat. § 23-212(D)-(F) (penalties in Arizona scheme imposed by court after adversarial proceeding).

IRCA established a comprehensive process for determining whether an employer knowingly hired an unauthorized worker. Only complaints with a "substantial probability of validity" may be investigated. 8 U.S.C. § 1324a(e)(1)(B). Employers are entitled to notice, a hearing before a federal administrative law judge under federal administrative law procedures, a finding that a knowing violation has occurred based on a preponderance of the evidence, and an opportunity for administrative and federal court appeals. 8 U.S.C. § 1324a(e)(2)-(3), (7)-(8).

341, 348 (2001) (holding that "plaintiffs' state-law . . . claims conflict with, and are therefore impliedly pre-empted by, federal law" because such claims could skew the "balance sought by the Administration"); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 152 (1989) ("Where it is clear how the [federal] laws strike [a congressional] balance in a particular circumstance, that is not a judgment the States may second-guess."); *see also Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 388 (2000); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 881 (2000); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987). Petitioner's disagreement with this Court's precedent is not a reason to grant the petition.

Under Hazleton's employment provisions, any superficially valid complaint is investigated, and penalties can be imposed without *any* court proceeding or other hearing. IIRAO §§ 4.B(3), 4.B(4), 7.G. Once penalties are imposed, "[a] business entity that has been 'subject to a complaint and subsequent enforcement' can then seek relief in court, but both the procedure and remedies available . . . are entirely unclear on the face of the ordinance." Pet. App. 94 (quoting IIRAO § 7.F). What is clear, though, is that Hazleton's employment provisions deprive employers of the procedural protections that are essential to the federal scheme. *Id.* at 92-94.

3. Hazleton's employment provisions extend further than federal law by requiring businesses, individuals, non-profits, and other entities to ensure that all of their independent contractors, casual hires, and others that they direct or permit to work are authorized to work in the United States. IIRAO § 4.A. IRCA, however, covers only "hir[ing]" or "recruit[ing] or refer[ring] for a fee, for employment in the United States." 8 U.S.C. § 1324a(a)(1)(A). Federal law does not require that employers verify the immigration status of certain categories of workers, such as independent contractors and casual domestic workers. *See* 8 C.F.R. § 274a.1(c)-(f); *see also* H.R. Rep. 99-682(I), at 57, *reprinted in* 1986 U.S.C.C.A.N. 5649 (stating that "[i]t is not the intent of this Committee that sanctions would apply in the case of casual hires"). IRCA's prohibition also does not apply to entities, such as unions, that refer individuals for employment but without a fee or

profit motive. *Cf.* IIRAO § 3.A (defining "business entity" broadly to include "any person or group of persons performing or engaging in any activity, enterprise, profession, or occupation for gain, benefit, advantage, or livelihood, whether for profit or not for profit," including entities that are not required to obtain business permits).

Hazleton's employment provisions thus encompass activities that Congress chose to exempt. That is not a mere difference between the two schemes, but a conflict that interferes with the attainment of the federal statute's full purposes and objectives. As the court of appeals explained with respect to Congress' exclude to regulate independent contractors from verification: "This was not an unreasoned choice, but part of the crafting of the statute . . . . Compelling businesses to concern themselves with the work authorization status of contractors alters [the relationship between businesses and contractors], and also raises costs." Pet. App. 102-03.

Individually and cumulatively, these conflicts with federal law amply support the decision below and do not require plenary review by this Court.

B. The Flaws That Hazleton's Employer Provisions Share With the Statute in *Whiting* Further Demonstrate Preemption

As we have explained, the court of appeals' holding that IIRAO's employment provisions are

preempted is justified based entirely on provisions in Hazleton's ordinance that are distinct from the Arizona law at issue in *Whiting*. The parts of the employment provisions that do overlap with *Whiting* only reinforce the conclusion that Hazleton's effort to regulate employment based on immigration status is invalid under both conflict and express preemption principles.

1. Hazleton's creation of its own investigatory and adjudicatory scheme to regulate unauthorized employment conflicts with IRCA's creation of a uniform national enforcement scheme. Pet. App. 94-95. Moreover, the prospect that every state and municipality could each create its own independent system to investigate, adjudicate, and punish employers for employing unauthorized workers "could not possibly be in greater conflict with Congress's intent for its carefully crafted prosecution and adjudication system to minimize the burden imposed on employers." *Id.* at 95 (citing *Buckman Co. v. Pls.' Legal Comm.*, 531 U.S. 341, 350 (2001), and *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 373 (2008)); *see also Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 161 (1989) ("prospect of all 50 States" adopting similar scheme supports finding of preemption).

2. Hazleton's attempt to force employers to enroll in E-Verify is incompatible with Congress' explicit decision to give employers the right to "elect" to enter the program, and to terminate their participation if they wish to do so. *See* IIRIRA § 402;

see also Geier v. Am. Honda Motor Co., 529 U.S. 861, 863 (2000) (state requirement preempted where it would "present[] an obstacle to the variety and mix of devices that the federal regulation sought"); *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 156 (1982) (state law preempted where it limited the availability of an option that the federal agency considered essential to ensure its ultimate objectives).

3. Additionally, Hazleton's law negates Congress' considered legislative judgment by creating an enforcement-only scheme that contains no countervailing prohibition on discrimination by employers. Pet. App. 103-08; *see also, e.g.*, H.R. Rep. No. 99-1000, at 87 (1986) (Conf. Rep.), *reprinted in* 1986 U.S.C.C.A.N. 5840, 5842 ("The antidiscrimination provisions of this bill are a complement to the sanctions provisions, and must be considered in this context"); H.R. Rep. No. 99-682(I), at 49, 68 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649 (same); H.R. Rep. No. 99-682(II), at 4 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5757, 5761 ("[I]f there is to be sanctions enforcement and liability there must be an equally strong and readily available remedy if resulting employment discrimination occurs."). By "plac[ing] all of its weight on one side of the regulatory scale," Pet. App. 105, Hazleton disrupts the balance Congress struck in IRCA.

4. Although petitioner does not mention express preemption in its Questions Presented,

respondents continue to maintain, as they have throughout this litigation, that the employment provisions also violate IRCA's express preemption provision, 8 U.S.C. § 1324a(h)(2). Like the Arizona law in *Whiting*, Hazleton's employment provisions do not constitute a "licensing or similar law[]" within the meaning of that provision's parenthetical saving clause. The express preemption of the employment provisions thus provides a separate and independent ground for affirming the judgment below.

In sum, Hazleton's employment provisions cannot stand if Arizona's law fails, but *certiorari* can and should be denied in this case regardless of (and without any need to wait for) the outcome in *Whiting*.

II. The Housing Provisions Do Not Warrant Review

A. Courts Have Unanimously Disapproved Hazleton-Type Housing Restrictions

There is no conflict among the circuits—and indeed, no conflict among the courts at any level—regarding the legality of housing restrictions like Hazleton's that would justify *certiorari* on these issues.

Courts across the country have unanimously disapproved of laws modeled on the housing provisions of Hazleton's IIRA and RO. Two district judges in the Northern District of Texas have

separately found such laws invalid. *Villas at Parkside Partners v. City of Farmers Branch*, 701 F. Supp. 2d 835 (N.D. Tex. 2010) (Boyle, J.), *appeal pending*, No. 10-10751 (5th Cir.) ("*Farmers Branch II*"); *Villas at Parkside Partners v. City of Farmers Branch*, 577 F. Supp. 2d 858 (N.D. Tex. 2008) (Lindsay, J.) ("*Farmers Branch I*").[9] A district judge in the Southern District of California temporarily enjoined another Hazleton-type housing ordinance, finding "serious questions" regarding its constitutionality; the municipality then suspended the ordinance and settled the case. *Garrett v. City of Escondido*, 465 F. Supp. 2d 1043 (S.D. Cal. 2006).[10] And a state court in Missouri temporarily enjoined yet another such ordinance; the municipality then repealed that law. *Reynolds v. City of Valley Park*, No. 07 CC-1420, (Mo. Cir. Ct. St. Louis Co., Apr. 5, 2007),

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[9] In *Farmers Branch I*, Judge Lindsay permanently enjoined Farmers Branch Ordinance 2903 because it was an impermissible "regulation of immigration." 577 F. Supp. 2d at 867-76. Farmers Branch then adopted Ordinance 2952, which modified its housing scheme in light of the *Farmers Branch I* decision. *See Farmers Branch II*, 701 F. Supp. 2d at 840-41. In separate litigation against the new measure, Judge Boyle permanently enjoined Ordinance 2952 "both as a 'regulation of immigration' and under the doctrine of implied preemption." *Id.* at 859.

[10] The city of Riverside, New Jersey, similarly repealed its Hazleton-type law after plaintiffs challenged it in state court. *See* Ken Belson and Jill P. Capuzzo, *Towns Rethink Laws Against Illegal Immigrants*, N.Y. Times, Sept. 26, 2007.

http://www.clearinghouse.net/chDocs/public/IM-MO-0001-0022.pdf.[11]

The Third Circuit is the first court of appeals to have addressed this issue, so no conflict among the circuit courts can exist at this point. The issue continues to percolate, with one case currently being briefed in the Fifth Circuit (*Villas at Parkside Partners v. City of Farmers Branch*, No. 10-10751) and another underway in the District of Nebraska (*Keller v. City of Fremont*; *Martinez v. City of Fremont* (Nos. 8:10-cv-270, 4:10-cv-3140) (consolidated)). Should a conflict eventually develop, questions relating to the housing provisions might then be appropriate for this court's review. At present, however, they are singularly unworthy of this Court's consideration.

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[11] Petitioner argues that *Gray v. City of Valley Park*, No. 4:07CV00881 ERW, 2008 WL 294294 (E.D. Mo. Jan. 31, 2008), an unpublished district court decision upholding an *employment* ordinance, suggests that *certiorari* should be granted on its claim that the Third Circuit incorrectly found Hazleton's *housing* provisions preempted. Pet. Br. 29. However, Valley Park repealed its housing ordinance after it was challenged in *Reynolds*, and nothing in *Gray* purports to address or uphold a housing restriction. *See Gray*, 2008 WL 294294, at *5 ("At issue in this lawsuit is only Ordinance No. 1722, the employment provision.").

B. This Case Does Not Present a Circuit Conflict Regarding the Federal Criminal Harboring Statute

Although petitioner attempts to manufacture a circuit split regarding the federal criminal harboring statute, 8 U.S.C. § 1324(a)(1), the decision below does not conflict with any other circuit court's interpretation of that statute. Petitioner contended below that Hazleton's housing provisions "mirror" the federal harboring statute and that such mirroring precludes a finding of preemption under a theory of "concurrent enforcement" authority. Pet. Br. 28-29.[12] The court of appeals disagreed, first explaining that under Third Circuit precedent construing § 1324(a)(1), harboring "requires some act of obstruction that reduces the likelihood the government will discover the alien's presence," and that knowingly renting an apartment to a person lacking recognized immigration status "is not in and

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[12] Petitioner purports to find this authority in scattered circuit court cases discussing the direct enforcement of federal law by state officials—*not* state or local laws that regulate in the same areas as federal law. *See Lynch v. Cannatella*, 810 F.2d 1363, 1371 (5th Cir. 1987); *Gonzales v. City of Peoria*, 722 F.2d 468, 475 (9th Cir. 1983); *Marsh v. United States*, 29 F.2d 172, 174 (2d Cir. 1928). Not only is Hazleton mistaken in characterizing its housing provisions as "concurrent," but its underlying theory is also incorrect. *See, e.g., Crosby*, 530 U.S. at 379-80 ("Conflict is imminent when two separate remedies are brought to bear on the same activity." (punctuation and citation omitted)); *Wisconsin Dept. of Indus. v. Gould Inc.*, 475 U.S. 282, 286-87 (1986) (invalidating state statute that imposed additional sanction on companies that violated federal law).

of itself [such] conduct." Pet. App. 118-19 (citing *United States v. Ozcelik*, 527 F.3d 88, 100 (3d Cir. 2008)).

Critically, the court of appeals went on to explain that, although some

> other Courts of Appeals have held that a showing of concealment is unnecessary . . . , *even under the more lenient tests of these jurisdictions*, we are not aware of any case in which someone has been convicted of 'harboring' merely because s/he rented an apartment to someone s/he knew (or had reason to know) was not legally in the United States.[13]

Thus, while recognizing that the Third Circuit might reach a different conclusion from some other circuits in *some* criminal harboring cases, the court of appeals emphasized that Hazleton's position in this case is not supported by a single analogous case from any circuit.

That remains true today. Petitioner has not cited any case in which knowingly renting an apartment to a person who lacks immigration status, without "much more," Pet. App. 120, resulted in a

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[13] Pet. App. 119-20 (emphasis added) (discussing *United States v. Tipton*, 518 F.3d 591, 595 (8th Cir. 2008); *United States v. Zheng*, 306 F.3d 1080, 1082 (11th Cir. 2002); *United States v. Kim*, 193 F.3d 567, 574-75 (2d Cir. 1999); and *United States v. Sanchez*, 963 F.2d 152, 155 (8th Cir. 1992)).

conviction. To the contrary, all of the cases that Petitioner characterizes as in tension with the court of appeals' holding (most of which are unpublished) involve far more than simple rental. For example, in *United States v. Franco-Beltran*, 229 Fed. Appx. 592 (9th Cir. 2007) (unpublished), the defendant admitted to renting to a known alien smuggler and to "bringing people" herself into the United States. Similarly, the defendant in *United States v. Acosta de Evans* had met the alien in Mexico prior to her entry to the United States and had "discussed with her the difficulty getting immigration papers." 531 F.2d 428, 429 (9th Cir. 1976).[14] In *United States v. Balderas*, 91 Fed. Appx. 354, 355 (5th Cir. 2004) (unpublished), the defendant deployed a "red light [next to his home] that could function as a signal to [unauthorized] aliens" and the facts suggest that defendant's home, far from simply being a rental property typical of a landlord-tenant relationship,

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[14] Moreover, subsequent Ninth Circuit cases that petitioner does not cite clarify that a conviction for harboring requires that defendants intended to violate the law, that is, that defendants acted with *"the purpose of* avoiding [the aliens'] detection by immigration authorities." *United States v. You*, 382 F.3d 958, 966 (9th Cir. 2004) (citing *United States v. Nguyen*, 73 F.3d 887, 894 (9th Cir. 1995)), *cert. denied*, 543 U.S. 1076 (2005). In *Nguyen*, the court explained that "[w]ere we to conclude [that no *mens rea* was required], we would be left with a statute that exposes persons who perform innocent acts to lengthy prison sentences." 73 F.3d at 893. *See also United States v. Castaneda-Melchor*, 387 Fed. Appx. 767, 769 (9th Cir. 2010) (unpublished) (following *You*); *United States v. Torres-Flores*, 502 F.3d 885, 888 (9th Cir. 2007) (same).

served as a link in an ongoing operation intended to conceal the presence of unauthorized aliens.

This case simply does not present a conflict regarding the harboring statute for the Court to resolve.

C. Any Circuit Differences Regarding the Scope of the Harboring Statute Would Be Better Addressed in a Different Case

Having failed to demonstrate that this case squarely presents a conflict regarding § 1324(a)(1), petitioner instead asserts that the Third Circuit would have reached different results from other Circuits in other cases presenting different sets of facts. Pet. Br. 39-41. Even assuming that there were some meaningful disagreement among the Circuits regarding the proper interpretation of § 1324(a)(1), this case is not an appropriate vehicle to resolve it for at least four reasons.

First, the court of appeals' harboring analysis in this case does not actually conflict with any decision of any other court of appeals, as explained above. Second, as also explained above, there is no circuit conflict as to the larger question of the validity of housing restrictions like Hazleton's. Third, the Court can most appropriately address the reach of this federal criminal provision in a case actually arising under the provision. This case implicates the scope of § 1324(a)(1) only obliquely, if at all. In contrast, the specific facts and

circumstances of actual criminal cases would allow the Court to focus its attention on any interpretive issues that genuinely call for this Court's guidance. Fourth, the court of appeals' finding regarding the harboring statute was not necessary to its affirmance of the injunction: The court of appeals correctly found the housing provisions invalid on multiple grounds, many of which would apply even if knowingly renting to a person lacking immigration status amounted to a violation of the federal harboring statute.

D. Hazleton's Housing Provisions Are Preempted

The court of appeals was plainly correct in finding that Hazleton's housing provisions violate the Supremacy Clause on three separate grounds: because they are a regulation of immigration, and therefore encroach on authority the Constitution has entrusted exclusively to the federal government (Pet. App. 111-12); because they are field preempted by the Immigration and Nationality Act ("INA") (*id.* at 112-14); and because they conflict with the INA (*id.* at 114-22).

Petitioner argues primarily that the court of appeals' field-preemption holding is "untenable," without directly addressing either the regulation-of-immigration or the conflict-preemption points. Pet. Br. 27-41. Thus, its attack on the court of appeals' reasoning is at best incomplete and falls far short of

demonstrating that the Court should grant plenary review in order to correct the purported error below.

Even as to field preemption, petitioner's arguments are entirely unpersuasive. Petitioner characterizes the housing provisions at issue as "simply denying illegal aliens rental accommodations in a single city," Pet. Br. 31, but does not actually dispute the court of appeals' conclusions that the housing provisions would exclude many people from residing in Hazleton based on their immigration status, Pet. App. 112-13 & n.37, and would deny residence to individuals who are not ultimately subject to removal from the United States, *id.* at 114-17. Nor does petitioner address the court of appeals' point that "[t]o be meaningful, the federal government's exclusive control over residence in this country must extend to any political subdivision." *Id.* at 113. As the court of appeals explained, the INA comprehensively regulates residence based on immigration status, and Hazleton's housing provisions improperly impinge on that field. *Accord Farmers Branch II*, 701 F. Supp. 2d at 857-59.

Petitioner's claims that the court of appeals' analysis regarding the housing provisions has "far-reaching implications" for other types of state or local laws relating to immigration, Pet. Br. at 32-33, are overwrought. In particular, petitioner's assertion that Third Circuit's housing analysis also extends to employment, *id.*, is self-evidently incorrect: the court of appeals took an entirely different approach to the employment provisions in its decision below. The

housing provisions are different because they directly affect residence and presence. With respect to those provisions, the Third Circuit panel properly refused to "bury [their] heads in the sand ostrich-like ignoring the reality of what these ordinances accomplish," Pet. App. 111, and rejected Hazleton's attempt to usurp the federal government's immigration authority.

CONCLUSION

The Court should deny the petition in its entirety. If the Court chooses to hold the petition pending a decision in *Whiting*, it should distinguish between the issues that relate to the employment (Question 1) and the housing (Questions 2 and 3) provisions of Hazleton's ordinances. The housing provisions do not overlap with *Whiting* and should be denied whenever the Court rules on the petition.

Respectfully submitted,

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No. 10-772

In The
Supreme Court of the United States

THE CITY OF HAZLETON, PENNSYLVANIA,

Petitioner,

v.

PEDRO LOZANO, HUMBERTO HERNANDEZ, ROSA LECHUGA, JOHN DOE 1, JOHN DOE 2, JOHN DOE 3, A MINOR, BY HIS PARENTS, JANE DOE 1, JANE DOE 2, JANE DOE 3, JOHN DOE 4, A MINOR, BY HIS PARENTS, BRENDA LEE MIELES, CASA DOMINICANA OF HAZLETON, INC., HAZLETON HISPANIC BUSINESS ASSOCIATION, PENNSYLVANIA STATEWIDE LATINO COALITION, JANE DOE 5, JOHN DOE 7, JOSE LUIS LECHUGA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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PETITIONER'S REPLY BRIEF

I. Respondents Mischaracterize One Conflict Preemption Holding as Four Separate Holdings.

The most compelling reason for this Court to grant the writ – or at a minimum, grant, vacate, and remand (GVR) this case to the Third Circuit – is that this Court is currently considering *the same preemption challenges to a similar statute* in the pending case of *Chamber of Commerce v. Whiting*, No. 09-115. *Whiting* involves preemption challenges to an Arizona law which, like the IIRAO, mandates the use of the federal E-Verify system for certain employers and establishes a state-level process for suspending the business licenses of employers who knowingly hire unauthorized aliens.

Respondents, in their Brief in Opposition (hereinafter "Resp."), acknowledge that "there is significant overlap in the preemption issues raised by Hazleton's employment provisions and those raised by the Arizona law at issue in *Whiting*." Resp. 11. However, Respondents claim there are additional, independent preemption holdings in the opinion of the Third Circuit that would be unaffected by the decision of this Court in *Whiting*. Resp. 12. Therefore, they insist that even a decision sustaining the Arizona law in *Whiting* would not help Petitioners. *Id.*

Respondents' argument is flawed on multiple levels – not the least of which is that it requires this

Court to assume that Respondents will prevail on the merits. An additional problem is that Respondents mischaracterize the holding of the court below. Respondents do so by arguing that each of the four reasons that the court gave to support its conflict preemption holding is a separate and independent holding. Resp. 12, 20. This is a significant misreading of the decision below.

The Third Circuit relied on a *single* conflict preemption argument in invalidating the employment provisions of the IIRAO: "The IIRAO substantially undermines [the] careful balance" allegedly struck by Congress in enacting IRCA. App. 88. The court reiterated, "Hazleton's IIRAO undermines IRCA's careful balancing of objectives in at least four ways." App. 92. The court then described four ways the IIRAO undermines the purported balance: (1) it increases employers' burdens by creating a separate adjudicative scheme, App. 92-95; (2) it induces employers to use the federal E-Verify electronic work verification system, App. 96-103; (3) it refers to independent contractors, App. 103-04, and (4) it contains inadequate anti-discrimination provisions, App. 104-07.

Respondents mischaracterize the Third Circuit's holding by declaring that each of these four reasons is a free-standing basis for a conflict preemption holding. *See* Resp. 12, 17. Therefore, Respondents suppose, if the forthcoming *Whiting* decision does not address each of these four issues, then the IIRAO would still be preempted. The problem with Respondents' argument is that the Third Circuit never

specified how many of the IIRAO's four "fail[ures] to afford proper weight" would suffice to tip the IRCA balance. App. 101. Was one enough, as Respondents assert? The Third Circuit did not say. *See* App. 88-107.

Assuming *arguendo* that Respondents' reading of the opinion below were correct, Respondents' arguments still would fail, as explained in Part II.

II. Respondents' Additional Conflict Preemption Arguments Against the IIRAO Employment Provisions are Unavailing.

Respondents assert that the IIRAO's employment provisions are conflict preempted in multiple independent ways. Respondents also contend that two alleged conflicts between the IIRAO and the federal scheme do not exist between the Arizona law and the federal scheme.[1] In each case, the asserted conflict is either nonexistent or irrelevant.

---

[1] Respondents make this point regarding the presence of a good-faith compliance defense, Resp. 12, and the attributes of the IIRAO hearing process. Resp. 15.

A. The Existence of a Defense of Good-Faith Compliance With the I-9 Process is an Irrelevant Distinction Between the IIRAO and the Arizona Law.

Respondents first argue that the IIRAO does not include a defense of good-faith compliance with the I-9 process, while the Arizona law does. Resp. 12-14. However, Respondents are forced to concede that while the face of the Arizona statute includes such a defense, in practice 8 U.S.C. § 1324a(b)(5), which limits the use of I-9 information, will make such a defense meaningless. Resp. 12, n.7. Thus, it is a distinction without a difference.

Respondents also fail to consider how the IIRAO operates. The IIRAO does not immediately penalize any employer who is found to have hired an unauthorized alien. Rather, the IIRAO first offers such an employer an opportunity to correct his error. Once a complaint is filed and it is subsequently determined that an employer has hired an unauthorized alien, the employer is given three business days to correct the violation. If the employer does so, no penalty occurs. IIRAO § 4.B(4), App. 354. In addition, this three-day period may be tolled if the employer invokes IIRAO §§ 7.C(2) or 7.C(3). App. 364-65. Thus, the employer can bring the administrative proceeding to a halt by terminating the unauthorized alien's employment. Because Respondents brought a facial challenge before the IIRAO was in effect, it is uncertain whether any employer would ever go past this point in the process. Thus, in the context of this facial

challenge, it is unclear how a good-faith compliance provision could even be relevant.

B. Respondents Misrepresent the IIRAO's Administrative Hearing Procedure and Due Process Protections.

Respondents next argue that the IIRAO differs from the Arizona law because it "impos[es] penalties on employers without a hearing or a finding by a neutral decisionmaker." Resp. 15. This argument significantly misrepresents the IIRAO, which provides an administrative hearing where the employer may present information relating to the identity of the employee for determination of the employee's work authorization. IIRAO § 4.B(3), App. 355. In the district court, the head of the Hazleton Code Enforcement Office described the planned implementation of Section 4.B(3). He explained that this section described an administrative hearing process including notice and an opportunity for the employer to present any relevant information. *See* App. 284, n.59.

Because the IIRAO has never been in effect, any judicial assessment of this asserted distinction is premature. The officials involved must be given the opportunity to construe the law in a constitutional manner. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008).

Respondents also mischaracterize the additional due process and judicial review protections provided in IIRAO Section 7, asserting that "penalties can be

imposed without any court proceedings or other hearings." Resp. 16. However, Section 7.F provides that any business entity or employee subject to a complaint and enforcement may bring an action to challenge enforcement of the IIRAO at any time, including prior to the imposition of any penalty. The action may be brought in the Magisterial District Court of Hazleton, subject to appeal through the Pennsylvania state court system, or in any other court of competent jurisdiction. IIRAO § 7.F, App. 367.

Finally, it must be remembered that Respondents' preemption challenge on this point is that any system of adjudication that is not literally identical to the "federal scheme" is conflict preempted. Resp. 16. However, Respondents fail to mention that Arizona's law too operates through a state court adjudicative process that differs from the federal scheme. Ariz. Rev. Stat. § 23-212. The principal question before this Court in determining whether to grant the writ (at least for GVR purposes) is whether the forthcoming decision in *Whiting* will be applicable to the instant case. Minute distinctions between the adjudicative process of the Arizona law and the IIRAO will likely be irrelevant.

C. The IIRAO's Treatment of Casual Domestic Labor and Independent Contractors Does Not Present a Conflict with Federal Law.

Respondents also argue that the IIRAO's treatment of independent contractors and casual domestic labor presents a separate source of conflict preemption. Resp. 16-17. However, Respondents' argument misreads the IIRAO to find a conflict with federal law where none actually exists.

Under federal law, a person or entity may not hire an individual without complying with certain employment eligibility verification requirements. 8 U.S.C. § 1324a(a)(1)(B)(i). There is a narrow, non-statutory exception for casual domestic workers under 8 C.F.R. § 274a.1(h). Respondents fail to mention that this regulatory exception only extends to "casual employment *by individuals*" where the workers "provide domestic service *in a private home* that is sporadic, irregular or intermittent." *Id.* (emphasis added). This "domestic" employment exemption is narrow – including only household tasks that would normally be completed by a resident of the household. *Jenkins v. Immigration and Naturalization Services*, 108 F.3d 195, 197 (9th Cir. 1997). In addition, "domestic" work only refers to household tasks completed *within* one's private abode. *Id.*

In contrast, the IIRAO extends only to employment relationships involving a "business entity." IIRAO § 4.A, App. 354. The term "business entity"

does not extend to a homeowner employing a casual domestic worker. IIRAO § 3.A(2), App. 352. Because the federal casual domestic worker exception is defined so narrowly, there is no overlap with the IIRAO and no conflict with federal law.

Respondents' argument regarding independent contractors is also incorrect. Employers have no duty under federal law to determine the employment eligibility of independent contractors. However, if an employer is made aware that an independent contractor or his worker is an unauthorized alien, then federal law effectively transforms that business-independent contractor relationship into an employer-employee relationship. The business entity that engages in such prohibited contractual activity "shall be considered to have hired the alien for employment in the United States in violation of paragraph 1(A)." 8 U.S.C. § 1324a(a)(4). Moreover, it is an additional violation of federal law for a business entity to continue to "employ" an independent contractor once the business entity has learned that the person "is (or has become) an unauthorized alien. . . ." 8 U.S.C. § 1324a(a)(2).

The IIRAO is consistent with this federal scheme. Once the federal government verifies that an alien worker is unauthorized, the business entity receives official notification of that fact from the City under IIRAO § 4.B(3); App. 355. At that point, federal law treats the relationship as an employer-employee relationship. Accordingly, by requiring the business entity to terminate the employment of the

unauthorized alien or otherwise correct the violation, the IIRAO is consistent with federal law.

In summary, Respondents' attempt to identify additional bases of conflict preemption (while asking this Court to assume that they are correct on the merits) is unavailing. Respondents have failed to explain why the writ should not issue for GVR purposes in light of this Court's forthcoming decision regarding nearly-identical preemption claims in *Whiting*.

III. The Circuits Have Uniformly Held that Licensing Sanctions are Not Expressly Preempted by 8 U.S.C. § 1324a(h)(2).

Respondents next suggest that this Court should deny the writ because the IIRAO's licensing sanctions are "expressly preempted" and note that Petitioners did not "mention express preemption" in their Petition. Resp. 19-20. Petitioners did not "mention" express preemption because the Third Circuit, like every other Circuit to address the issue, held that the provisions were *not* expressly preempted. App. 81-82; *Chicanos Por La Causa v. Napolitano*, 558 F.3d 856, 866 (9th Cir. 2009) *cert. granted*, *Whiting*, No. 09-115; *Chamber of Commerce v. Edmondson*, 594 F.3d 742, 766 (10th Cir. 2009). Because the Third Circuit rejected Petitioners' express preemption claim, it does not "provide[ ] a separate and independent ground for affirming the judgment below." Resp. 20.

IV. Lower Courts Need Guidance Now on Whether Rental Housing Ordinances are Preempted.

Respondents assert that review of the IIRAO rental provisions is unnecessary, claiming that lower courts "unanimously" share their position. Resp. 20-22. Respondents misrepresent the holding of at least one of these courts.[2] Respondents also fail to mention that another federal court is specifically awaiting guidance from the instant case before proceeding. In 2007, the Northern District of Georgia issued a consent order staying all proceedings in a challenge to a county ordinance prohibiting the rental of apartments to illegal aliens until further guidance was provided by a final decision in this case. *Stewart, et al. v. Cherokee County*, No. 07-CV-0015 (Order of Jan. 4, 2007).[3]

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[2] Respondents' characterization of *Reynolds v. Valley Park* is misleading. *See* Resp. at 21. The state court in *Reynolds* held that the city's rental ordinance violated Missouri *state* law, not federal law. *Reynolds v. Valley Park*, No. 06-CC-3802 (Mo.Cir.Ct. St. Louis Co., Mar. 13, 2007). The Eastern District of Missouri actually *rejected* a federal preemption challenge to the city's employment ordinance. *Gray v. Valley Park*, 2008 U.S. Dist. LEXIS 7238 (E.D. Mo. Jan. 31, 2008) *aff'd on other grounds* 567 F.3d 976 (8th Cir. 2009).

[3] The court also stated that it was waiting for guidance from the *Valley Park* case. However, Valley Park repealed its rental ordinance; the federal courts reviewed preemption challenges to the employment ordinance only. *See Gray*, 2008 U.S. Dist. LEXIS 7238 at *2. Thus, only the *Hazleton* case now has a bearing on the stayed proceeding.

As Respondents acknowledge, at least two federal district courts have issued opinions regarding similar ordinances. Resp. 21. Respondents also correctly state that additional municipalities have similar ordinances pending before lower courts. Resp. 22. In addition, still more municipalities have sought to enact similar ordinances, but have declined to do so because of legal uncertainty and the attendant threat of litigation.[4] This Petition presents the Court with a timely opportunity to provide necessary guidance to lower courts on this pressing issue of national importance.

V. Review is Warranted to Resolve the Circuit Split Regarding the Definition of "Harboring."

Respondents claim that no Circuit split exists concerning the definition of "harboring" in 8 U.S.C. § 1324(a)(1)(A)(iii). Resp. 23-26. However, the Third Circuit itself disagreed. App. 118-19. Respondents cannot obscure the plain reality that the Circuits are currently applying three distinct definitions of that term. Pet. at 34-38.

Respondents also claim that the three cases identified by Petitioner, in which Circuit Courts

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[4] *See*, e.g., Stephen McLamb, *ACLU Looking Into Albertville's Plans for Stopping Illegal Immigration*, WAFF (July 15, 2010), available at http://www.waff.com/Global/story.asp?S=12815239#.

found harboring where defendants knowingly rented accommodations to illegal aliens, differ materially from the instant case. They claim that the three cases concern "much more" than knowingly renting to illegal aliens. Resp. 25. However, Respondents mischaracterize these cases.

Respondents' misrepresentation of *United States v. Franco-Beltran*, 229 Fed. Appx. 592 (9th Cir. 2007), is particularly brazen. Respondents claim that the defendant in that case "admitted . . . to 'bringing people' *into the United States*." Resp. 25 (emphasis added). Respondents added the words "into the United States." The defendant's co-conspirator had directed the assistant apartment manager to raise the rent of "several apartments used for harboring aliens" because the defendant was "bringing people." *Franco-Beltran*, 229 Fed. Appx. at 594. However, the defendants' nephew actually transported the aliens and was separately prosecuted for alien smuggling. *Id.* Nothing in the opinion suggested that the defendant was also smuggling illegal aliens into the country. It was enough that she provided apartments to persons whom she knew to be illegal aliens. *See id.* Moreover, the defendant did nothing to conceal the illegal aliens – the element at the center of the Circuit split.

With respect to *United States v. Acosta de Evans*, 531 F.2d 428 (9th Cir. 1976), Respondents point to the fact that the defendant had a conversation with the illegal alien in Mexico, prior to the harboring, during which the illegal alien stated that she could not

obtain "immigration papers." Resp. 25. Respondents therefore declare that the defendant somehow did "much more" than knowingly provide an apartment to an illegal alien. Resp. 24-25. On the contrary, all that the conversation revealed was that the defendant "knew that Imelda was illegally in the country." *Acosta de Evans*, 531 F.2d at 429. More importantly, the defendant did nothing to hide the illegal alien from detection during the two months that she harbored her. As the Ninth Circuit stated: "De Evans' central contention is that the word 'harbor' . . . means to harbor so as to prevent detection by law enforcement agents . . . We disagree." *Id.* The court concluded by defining "'harbor' to mean 'afford shelter to' . . . " *Id.* at 430. Respondents' suggestion that some other element of harboring was required in *Acosta de Evans* is false.

Respondents also claim that *United States v. Balderas*, 91 Fed. Appx. 354 (5th Cir. 2004), involved much more than knowingly renting to illegal aliens because the opinion noted that a "red light [on the house] could function as a signal to aliens." *See* Resp. 25. Respondents add their own spin to this fact and declare that case involved an "ongoing operation intended to conceal the presence of unauthorized aliens." Resp. 25-26. Respondents miss the point of the case. The question was whether the bare fact that the defendant knew that illegal aliens were being afforded accommodations in a section of his home could sustain a harboring conviction. The defendant contended "the evidence was insufficient to support

his conviction because it proved, at most, that he provided illegal aliens with temporary shelter." 91 Fed. Appx. at 354. The Fifth Circuit rejected this contention, noting that the defendant's wife "informed [him] that there were illegal aliens staying there; and he told her he did not care." *Id.* at 355. In other words, this evidence was sufficient to support his conviction for harboring. Contrary to Respondents' suggestion, the Fifth Circuit rejected the view that more was necessary for harboring to occur. *See also United States v. Martinez-Medina*, 2009 U.S. App. 890, *3 (5th Cir. 2009).

For all of these reasons, Respondents have failed to show why the writ should not issue.

Respectfully submitted,

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IN THE

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CITY OF HAZLETON,

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PEDRO LOZANO, *et al.*,

Respondents.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Third Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The City of Hazleton, Pennsylvania has adopted two ordinances – the Rental Regulation Ordinance (RO) and the Illegal Immigration Relief Act Ordinance (IIRAO) – that, *inter alia*, regulate the leasing and occupancy of residential housing units within the City, in an effort to prevent their occupancy by illegal immigrants. *Amici* address the following issue only:

Whether the housing provisions of the RO and/or the IIRAO are impliedly preempted by federal law, either because they seek to regulate a field that is fully occupied by federal immigration law or because they conflict with federal immigration law.

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INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a public interest law and policy center headquartered in Washington, D.C., with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. WLF has appeared in courts across the country to ensure that governments at all levels possess the resources to combat illegal immigration and to prevent aliens from seeking to vote illegally. *See, e.g., Crawford v. Marion County Bd. of Elections*, 553 U.S. 181 (2008); *Gray v. City of Valley Park*, 567 F.3d 976 (8th Cir. 2009); *Friendly House v. Napolitano*, 419 F.3d 930 (9th Cir. 2005). WLF also filed a brief in this matter when it was before the appeals court.

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, and has appeared as *amicus curiae* in this Court on a number of occasions.

At issue in this case are Hazleton, Pennsylvania ordinances that address two issues: employment of illegal aliens and the leasing of housing to illegal aliens. WLF and AEF support the efforts of Petitioner, the City

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part; and no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Ten days prior to the due date, counsel for *amici* provided counsel for Respondents with notice of intent to file. All parties consent to the filing.

of Hazleton, to obtain the Court's review of both the employment and housing aspects of its ordinances. We recognize, however, that the Court is already reviewing a case that raises preemption issues virtually identical to those raised by the employment aspects of the ordinances, and thus that the Court may choose simply to hold Hazleton's petition pending a decision in that case. *See Chamber of Commerce of the United States v. Whiting*, No. 09-115, *cert. granted*, 130 S. Ct. 3498 (2010).

WLF and AEF nonetheless urge the Court to grant review in this case in order to consider the housing aspects of the Hazleton ordinances. The Court's decision in *Whiting* is unlikely to address issues relating to the constitutionality of Hazleton's efforts to regulate the leasing of housing to illegal aliens. Throughout the past five years, numerous local governments have adopted similar housing ordinances. Those governments have been watching this case closely to discover whether housing ordinances of this type are preempted by federal law. Unless the Court grants review, they will be denied the definitive guidance they have been seeking.

Hazleton's is not the only housing ordinance that has been challenged in court. But none of the other challenges has progressed nearly as far as has this case. If the Court declines to review the housing aspects of the Hazleton ordinances, it is unclear when (if ever) another case raising similar issues would reach the Court. Thus, denial of review would leave numerous local governments across the country without the judicial guidance they so desperately need. WLF and

AEF are filing their brief in order to alert the Court to this situation.

Amici are concerned that the decision below interferes to an unwarranted degree with the authority of state and local governments to exercise their traditional police powers – including the regulation of employment and housing within their jurisdictions. Although *amici* fully support all aspects of Hazleton's certiorari petition, their brief focuses exclusively on preemption issues raised by Hazleton's efforts to regulate rental housing.

STATEMENT OF THE CASE

Amici briefly summarize the facts of the case as they relate to regulation of rental housing within the City of Hazleton.

Both of the ordinances at issue in the petition include provisions that regulate rental housing. The Rental Registration Ordinance ("RO"), Ordinance 2006-13, prohibits occupancy of a rental unit within Hazleton unless the owner has obtained a license from the City. RO §§ 6, 7.a. It further requires all adult occupants of such rental units to obtain an "occupancy permit" at the time they move into the unit. RO § 7.b. In order to obtain an occupancy permit, occupants must provide certain information to the City, including "proper identification showing proof of legal citizenship and/or residency." RO § 7.b.1(g).

Section 5 of the Illegal Immigration Relief Act Ordinance ("IIRAO"), most recently amended by

Ordinance 2007-7, also addresses housing issues. Section 5 imposes burdens on landlords only, not tenants. It prohibits a landlord from renting a dwelling unit in Hazleton to an illegal alien, "knowing or in reckless disregard of the fact that [the] alien has come to, entered, or remains in the United States in violation of law." IIRAO § 5.A.[2] If the City receives a "valid" complaint alleging a violation of IIRAO § 5.A, it is directed to obtain "identity data" from the landlord and forward it to the federal government for verification. IIRAO § 5.B(3).[3] If after completing the verification process, the City determines that the landlord has violated § 5.A – a determination that requires *both* a finding that the tenant is an illegal alien *and* a finding that the landlord has acted knowingly or recklessly – and the landlord fails to correct the violation within the allotted time period, the City is entitled to suspend the landlord's rental license until he/she takes steps to correct the violation. IIRAO § 5.B(4) & (6).

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[2] The prohibition is prospective only; it does not apply to leases in existence at the time that "any judicial injunction prohibiting [the IIRA's] implementation is removed," IIRA § 7.A, an event that has not yet occurred.

[3] The IIRA does not specify how Hazleton is to undertake such verification. Nonetheless, City officials have made clear that they intend to utilize the SAVE ("Systematic Alien Verification for Entitlements") Program, a federal program that allows State and local governments to verify electronically whether an alien is lawfully present in the United States. The SAVE Program is an essential component of numerous federal programs administered by State and local governments; for example, it provides them with a means of determining whether applicants for public benefits qualify for such benefits.

Respondents have mounted a facial challenge to the RO and the IIRAO. The Second Amended Complaint filed in January 2007 listed six plaintiffs who remained parties throughout proceedings in the Third Circuit; all six asserted that they were adversely affected by the housing provisions of the RO and the IIRAO. Respondents include one individual who owns rental property (Pedro Lozano), four individuals who live in rental units in Hazleton (John Does 1, 3, and 7 and Jane Doe 5), and one organization whose members include landlords (Hazleton Hispanic Business Association). The Second Amended Complaint raised a variety of claims under state and federal law, but the only claim on which the Third Circuit ruled in Respondents' favor (and the only claim addressed by the petition) is their claim that the employment and housing provisions of the RO and the IIRAO are preempted by federal immigration law.

Following an 11-day hearing in March 2007, the district court entered final judgment for Respondents and permanently enjoined Hazleton from enforcing the IIRAO and the RO. Pet. App., App.159-App.336. It determined that all of the housing provisions of the two ordinances conflicted with federal immigration law and thus, based on application of implied conflict principles, were preempted by federal law. *Id.* at App.270-App.279.

The district court stated that even when the federal government determines (through its SAVE Program) that an alien is not lawfully present in the United States, the federal government has not necessarily determined that the alien should be required to leave the country. *Id.* at App.273-App.275. It stated

that the federal government may ultimately decide to grant such aliens permanent resident status, or may decide to temporarily stay removal proceedings. *Id.* The district court held that the housing provisions of the RO and IIRAO, by attempting to prevent such aliens from renting housing in Hazleton, conflicts with the federal determination that some such aliens may be permitted to stay in this country. *Id.* The court held that the housing provisions also conflict with federal immigration law because they requires City officials to determine whether individuals are properly in the country, a function (according to the district court) assigned exclusively under federal law to federal immigration judges. *Id.* at App.279.[4]

The Third Circuit affirmed, based on its conclusion that the housing provisions were expressly preempted by the U.S. Constitution and impliedly preempted by federal immigration law. *Id.* at App.109-App.122. It held that Hazleton was not entitled to a presumption against preemption of the housing provisions. *Id.* at App.111. While conceding that the regulation of rental housing is an area in which local governments traditionally exercise their police powers, the Third Circuit held that the ordinances were not really housing regulations at all but rather an attempt to "regulate who may live in Hazleton based on

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[4] The district court also addressed each of Respondent's other bases for challenging the ordinances' housing provisions. The court held that the IIRAO and the RO violated Respondents' federal procedural due process rights, *id.* at App.279-App.293, but it denied most of the other claims. None of those claims was addressed by the Third Circuit, and thus none is encompassed within the petition.

immigration status." *Id.* at App.110. Equating an attempt to regulate who may live in Hazleton with an attempt to regulate who may live in the United States, the court determined that the ordinances were not entitled to a presumption against preemption because "[d]eciding which aliens may live in the United States has always been the prerogative of the federal government." *Id.* at App.111.

The appeals court concluded that the remainder of its preemption analysis "flowed directly" from its conclusion that the Hazleton ordinances' housing provisions "regulate which aliens may live there." *Id.* The court held that such regulation constitute an effort to "regulate immigration" and thus is expressly preempted by the U.S. Constitution, which delegates such power exclusively to the federal government. *Id.* (citing *De Canas v. Bica*, 424 U.S. 351, 355 (1976)). The court also concluded that the housing provisions are impliedly preempted by federal immigration statutes. *Id.* at App.112-App.121. The court held that those statutes occupy the "field" of the continued residence within the U.S. of aliens already within the country, and thus that efforts by state or local governments to "regulate residence in this country based on immigration status" is "field-preempted." *Id.* at App.112.

Finally, the appeals court held that the ordinances' housing provisions were impliedly preempted because they conflict with provisions of the Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq.* *Id.* at App.114-App.121. The court stated:

> Under federal law, an unlawful immigration status does not lead instantly, or inevitably, to removal. Under most circumstances, a federal removal hearing under section 240 of the INA is required. Absent certain limited exceptions, this proceeding is the "sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States."

Id. at App.115 (quoting 8 U.S.C. § 1229a(a)(3)). The appeals court concluded that the Hazleton ordinances, by attempting to exclude illegal aliens from living within the City, conflicted with federal immigration policy because there was no assurance that the federal government would ever order that those illegal aliens be removed from the United States. *Id.* at App.116. As an example of such conflict, the court stated that "Hazleton would effectively remove from its City an alien college student the federal government has purposely declined to initiate removal proceedings against." *Id.*[5] The

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[5] The appeals court recognized that Respondents had presented a facial challenge to the IIRAO and the RO. *Id.* at App.69 n.25. It nonetheless did not consider whether the Hazleton ordinances might be unconstitutional *as applied* to the hypothetical college student but might nonetheless *not* be preempted when applied to illegal aliens (such as John Does 3 and 7 and Jane Doe 5) who make no claim that the federal government has affirmatively decided not to seek their removal. Indeed, the court said that it was "not at all clear" that the rule normally applicable to facial challenges – that a plaintiff can succeed on a facial challenge only by establishing that "the law is unconstitutional in all its applications," *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008) – was applicable here in

court rejected Hazleton's argument that 8 U.S.C. §1324(a)(1)(A)(iii), the federal statute that prohibits attempts to "conceal, harbor, or shield" illegal aliens from detection, demonstrates that the ordinances do not conflict with federal law. *Id.* at App.117-App.118. It stated, "The federal prohibition against harboring has never been interpreted to apply so broadly as to encompass the typical landlord/tenant relationship." *Id.* at App.118.

REASONS FOR GRANTING THE PETITION

The petition raises issues of great importance to state and local governments throughout the United States. Most studies have estimated that at least 11 million aliens living in United States are not lawfully present (a category of aliens referred to herein as "illegal immigrants"). The vast size of the undocumented alien population has led to calls from across the political spectrum for legislation to address the immigration issue – not only by Congress but also by state and local governments. State and local governments have responded to that call by adopting hundreds of statutes and ordinances. Some of that legislation has sought to assist illegal aliens in their efforts to assimilate into American society, but most has been designed to assist the federal government's efforts to enforce federal immigration law. Laws of the latter type have been adopted due in large measure to congressional statutes that encourage such assistance.

Housing ordinances of the sort at issue here have

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light of the unique circumstances of this case. *Id.*

been adopted by communities across the country. The constitutionality of such ordinances has been called into question by the Third Circuit's decision in this case. Review is warranted to provide guidance to those communities – as well as to the numerous other communities that are considering adopting similar ordinances – regarding whether such housing ordinances are preempted by federal immigration law. Review is particularly warranted because there is little likelihood that another case raising similar issues will reach the court in the foreseeable future. Denial of review would leave the numerous similarly situated local governments, many of which have been looking to this case for definitive resolution of the preemption issue, without the guidance they so desperately need.

Review is also warranted because the decision below conflicts with *De Canas* and others of the Court's preemption decisions. *De Canas* made clear that state and local governments are generally free to adopt legislation designed to address issues raised by the presence of large numbers of illegal aliens, so long as the legislation does not amount to a "regulation of immigration" – that is, a determination of whether an alien should be permitted to remain in the country. 424 U.S. at 355. The Hazleton ordinances do not permit City officials to determine whether aliens should be permitted to remain in the United States. Rather, only after the federal government has informed Hazleton officials that an individual is an illegal alien do the IIRAO and the RO authorize City officials to initiate steps to deny rental housing to the individual. Moreover, *De Canas* makes clear that preventing illegal aliens from renting residential housing in Hazleton does

not constitute the regulation of immigration; denying rental housing in a single city to an alien is hardly the equivalent of forcing the alien to leave the country. While the IIRAO and the RO would be preempted if Congress h[illegible]adopted legislation mandating a different approach t[illegible]ousing policy for illegal aliens, the appeals court identified no such legislation. Review is warranted to resolve the conflict between the decision below and *De Canas*.

I. THE DECISION BELOW CONFLICTS WITH *DE CANAS* BY FINDING PREEMPTION DESPITE THE ABSENCE OF FEDERAL LEGISLATION GOVERNING HOUSING FOR ILLEGAL ALIENS

In determining whether a federal law preempts a challenged state law, the Court has established two guiding principles. First, "the purpose of Congress is the ultimate touchstone in every pre-emption case." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Thus, in the absence of evidence that the federal government intended to displace State law, there can be no preemption.

Second, courts "have long presumed" that the federal government "does not cavalierly pre-empt" state law because of its recognition that "the States are independent sovereigns in our federal system." *Id.* at 485. This presumption against preemption is particularly strong when States are acting to "protect the health and safety of their citizens," because "the States traditionally have had great latitude under their police powers to legislate as to the protection of the lives,

health, comfort, and quiet of all persons." *Id.* at 475. "In *all* pre-emption cases," a court must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was *the clear and manifest purpose* of Congress." *Id.* at 485 (emphasis added); *Wyeth v. Levine,* 129 S. Ct. 1187, 1194-95 (2009). The Court has held explicitly that the presumption against preemption applies even when the state law at issue touches upon immigration matters. *De Canas*, 424 U.S. at 355.

In striking down the IIRAO and the RO, the Third Circuit largely ignored the first guiding principle and expressly disavowed the second. Despite acknowledging that the leasing and occupancy of residential rental housing has long been a central focus of the police powers of state and local governments, the appeals court held that the presumption against preemption was inapplicable here because the IIRAO and the RO were not housing regulations of the traditional sort (*e.g.*, regulations designed "to ensure the health and safety" of tenants). Pet. App., at App.111. Rather, they were designed to exclude a class of individuals (illegal aliens) from renting housing within Hazleton. *Id.* The court cited no appellate case law in support of its position, a position that directly conflicts with *De Canas*'s holding that the presumption against preemption applies even when a state or local government is using its police powers for the express purpose of discriminating against illegal aliens and thereby preserving limited resources (whether jobs or rental housing) for citizens and resident aliens. 424

U.S. at 355.[6]

A. Congress Has Adopted No Law Directly Addressing the Provision of Rental Housing to Illegal Aliens

De Canas rejected claims that federal immigration statutes categorically preempted state or local regulation of illegal aliens. *Id.* at 358 (nothing "in either the wording or the legislative history of the INA" reveals "that Congress intended to preclude even harmonious state regulation touching on aliens in general"). Ten years after *De Canas* was decided, Congress adopted the Immigration Reform and Control Act of 1986 ("IRCA") for the purpose of preventing the employment of illegal aliens and thereby reducing the incentive for illegal entry into the country. IRCA quite clearly intended to impose *some* limits on local regulation touching on the employment of illegal aliens, *see, e.g.*, 8 U.S.C. § 1324a(h)(2), and thus *De Canas* has to some degree been superseded in the employment arena. But the Third Circuit's reliance on IRCA serves to highlight the sharp contrast between employment and housing issues: in the 35 years since *De Canas*, Congress has not adopted *any* legislation attempting to regulate housing for illegal aliens. Accordingly, *De Canas*'s rejection of assertions that Congress intended

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[6] A litigant may, of course, be able to overcome the presumption against preemption by demonstrating that the purpose and effect of a specific exercise of traditional police powers conflicts with federal policy. But nothing in the Court's case law supports jettisoning the presumption entirely simply because a state or local government is exercising its traditional police powers for an allegedly untraditional purpose.

broad preemption of state and local laws touching on immigration remains good law in the housing area, and conflicts sharply with the Third Circuit's holding that Congress has preempted state and local government regulation of the provision of rental housing to illegal aliens.

In recent years, Congress has adopted legislation requiring States to adopt practices designed to reduce the incentives for illegal aliens to remain in the country. *See, e.g.*, 8 U.S.C. §§ 1611, 1621 (prohibiting States – with very few exceptions – from paying public benefits to illegal aliens, regardless whether funding for the benefits derives from federal or state sources). It also adopted numerous statutory provisions encouraging state and local governments (and their employees) to cooperate with federal authorities in enforcing the immigration laws. *See, e.g.*, 8 U.S.C. §§ 1103(a), 1252c, 1357(g), 1373(a)-(c), & 1644; 42 U.S.C. § 611a (requiring a State receiving certain federal grants to report to ICE *at least* four times annually the names and addresses of those known to the State to be unlawfully in the United States). It defies logic to suggest that Congress demands that States ferret out illegal aliens to ensure that they are not receiving welfare benefits and actively solicits their cooperation in enforcing immigration laws, yet simultaneously prohibits them from taking steps to prevent illegal aliens from seeking rental housing. Certainly, nothing in any statutory language provides "clear and manifest" evidence that that was Congress's intent.

B. *De Canas* Contradicts the Third Circuit's Holding That Regulation of Housing Amounts to a Prohibited Regulation of Immigration

The Third Circuit conceded that "a state certainly can, and presumably should, regulate rental accommodations to ensure the health and safety of its residents, and that such regulation may permissibly affect the rights of persons in this country unlawfully." Pet. App., at App.111. But the court contended that the "reality" of the Hazleton ordinances was that they were not traditional housing regulations but rather were an impermissible effort to regulate immigration by regulating residence in Hazleton (and, by extension) residence in the United States "based on immigration status." *Id.* at App.112. The court deemed the ordinances to be a *de facto* regulation of immigration, asserting that it is "difficult to conceive of a more effective method of ensuring that persons do not enter or remain in a locality than by precluding their ability to live in it." *Id.* at App.112 - App.113.

The appeals court's conclusion that the IIRAO and the RO constituted a prohibited regulation of immigration directly conflicts with this Court's understanding of that term in *De Canas*. The Court there explained that while the "[p]ower to regulate immigration is unquestionably exclusively a federal power," the phrase "the regulation of immigration" has a narrow meaning – confined to "essentially a determination of who should or should not be admitted into the country." 424 U.S. at 354-55. The Court said that State statutes do not constitute the preempted

"regulation of immigration" merely because they have an indirect impact on immigration, so long as they do not seek to enlist State power to deport aliens living within the State. *Id.*

The appeals court sought to distinguish *De Canas* by asserting that regulation of rental housing is qualitatively different from other restrictions that state and local governments might impose on illegal aliens. The court asserted that depriving illegal aliens of rental housing is tantamount to deporting them because they would find it extremely difficult to remain in the country without access to rental housing.[7]

The effort to distinguish *De Canas* in this manner is unavailing. It may be very difficult for illegal aliens to remain in this country if they are denied access to rental housing, but the same could be said for numerous other restrictions that could be imposed on illegal aliens. For example, denying illegal aliens the ability to obtain employment would make it difficult for them to remain in this country, yet *DeCanas* had no difficulty in concluding that a California statute that prohibited the employment of illegal aliens did not constitute a preempted "regulation of immigration." *Id.* Similarly,

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[7] The court acknowledged that the Hazleton ordinances would not prevent illegal aliens from living in any community in the country besides Hazleton. Pet. App., at App.113. It nonetheless asserted that the option of living elsewhere in the country did not make the ordinances any less a regulation of immigration: "To be meaningful, the federal government's exclusive control over residence in this country must extend to any political subdivision. If Hazleton can regulate as it has here, then so could every other state or locality." *Id.*

prohibiting illegal aliens from driving makes it very difficult for illegal aliens to function in American society, yet courts have routinely rejected constitutional challenges to state laws denying illegal aliens access to driver's licenses. *See, e.g., Cubas v. Martinez*, 8 N.Y.3d 611 (2007). The Hazleton ordinances do not meet this Court's limited definition of a regulation of immigration, and the Third Circuit's effort to expand that definition so as to encompass regulations of the sort at issue here conflict with *De Canas*. Review is warrant to resolve that conflict.

C. Respondents' Conflict Preemption Claims Should Await an As-Applied Challenge

The Third Circuit held that the IIRAO and the RO conflicted with (and thus were impliedly preempted by) federal immigration law because they deny rental housing opportunities to illegal aliens who have not been (and may never be) ordered removed from the country. Pet. App., at App.115.

But because Hazleton does not assert the right to bodily remove illegal aliens from the United States (or even from Hazleton), it is difficult to discern the conflict asserted by the appeals court. The Hazleton ordinances no doubt disadvantage illegal aliens, but so do numerous other measures that federal law explicitly authorizes (and in some cases *requires*) state and local governments to adopt. For example, Congress adopted immigration reform legislation in 1996 that, among other things: (1) declared illegal aliens ineligible to receive non-emergency public benefits for which at least a portion of

the funding comes from the federal government, 8 U.S.C. § 1611; and (2) declared that in most instances States are *prohibited* from providing public benefits to illegal aliens, even if the funding comes solely from the State's own resources. 8 U.S.C. § 1621.[8] A principal goal of the 1996 legislation was "to remove the incentive for illegal immigration provided by the availability of public benefits." 8 U.S.C. § 1601(6). The 1996 legislation – which actively encourages (and in some cases *requires*) state and local governments to take steps designed to discourage aliens from coming to, and remaining in, this country – renders untenable the appeals court's claim that Congress viewed any such efforts as an unwarranted interference with the authority of immigration judges to make admission and removal decisions.

Federal officials may on occasion determine that some aliens who are not lawfully present in this country should nonetheless be allowed to remain and, indeed, should not even be subject to penalties based on their unlawful status.[9] But presumably, any such determi-

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[8] The statutes prohibit providing benefits to aliens that are not "qualified." In general, those not lawfully present in the United States are deemed not "qualified." The federal government established the SAVE Program in part to ensure that state and local governments would have the means to determine whether an alien is not "qualified" and thus ineligible for most public benefits. Providing state and local governments with that capability was particularly important because most federal public welfare programs (*e.g.*, TANF, Food Stamps, Medicaid) are administered at the local level.

[9] We note, for example, that federal law exempts from the ineligible-for-public-benefits provisions (8 U.S.C. §§ 1611 & 1621)

nations will be reflected in the response provided to Hazleton by federal officials under the SAVE program, and thus illegal aliens who are entitled to special protections would not be subject to eviction under §5 of the IIRAO.

If it ever happened that an illegal alien determined by federal officials to be entitled to special protection were nonetheless subjected to sanction under the IIRAO and the RO, then that individual could bring an as-applied preemption challenge to those ordinances. But none of the Respondents who have acknowledged that they are illegal immigrants (John Does 3 and 7 and Jane Doe 5) has alleged that he/she has been granted entitlement to such special protections. Respondents thus have no basis for asserting that the IIRAO and the RO are facially unconstitutional because the ordinances may conflict with special protections accorded to *other* illegal immigrants, so long as the ordinances' application to *Respondents* creates no conflict with federal immigration law. Their facial challenge to the ordinances must fail because they have failed to establish that "the law is unconstitutional in all its applications." *Washington State Grange*, 552 U.S. at 449.

Amici note that Hazleton points to the federal anti-harboring statute, 8 U.S.C. § 1324(a)(1)(A)(iii), as evidence that the federal government itself actively discourages the leasing of residential rental units to illegal aliens, and thus that the Hazleton ordinances

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any illegal alien who has applied for protection as a battered spouse or child. 8 U.S.C. § 1641(c).

cannot be deemed to conflict with federal law. The Third Circuit disagreed, stating, "The federal prohibition against harboring has never been interpreted to apply so broadly as to encompass the typical landlord/tenant relationship." *Id.* at App.118. *Amici* note that several other appeals courts read § 1324(a)(1)(A)(iii)far more broadly than does the Third Circuit; *amici* find the interpretation of the other appeals courts to be more persuasive. But even if the Third Circuit's interpretation § 1324(a)(1)(A)(iii) were the correct one, Respondents still could not prevail because they have failed to identify a federal immigration policy with which the IIRAO and the RO invariably conflict. Review is warranted to resolve the conflict with the Third Circuit's facial invalidation of the Hazleton ordinances and this Court's admonition that a plaintiff can succeed on a facial challenge only by establishing that the law is unconstitutional in all its applications.

II. REVIEW IS WARRANTED BECAUSE LOCAL GOVERNMENTS NEED GUIDANCE REGARDING LAWS DESIGNED TO REGULATE THE LEASING OF HOUSING TO ILLEGAL ALIENS

The Third Circuit is the only federal appeals court to have addressed whether state and local laws that regulate the leasing of residential housing units to illegal aliens are preempted by federal law. Accordingly, there is no inter-circuit split on the issue. Review by this Court is nonetheless warranted in light of the urgent need for guidance on the issue by local governments across the country. Although similar laws

have been adopted by many other local governments, it is unclear when, if ever, another case raising similar issues will reach the Court. Moreover, this case is a good vehicle for resolving the issue: the case involves a final judgment entered following a trial on the merits, and no procedural issues are likely to prevent the Court from reaching the merits of Respondents' preemption claims.

As both the Petition and the Third Circuit have documented, state and local governments have adopted hundreds of laws in the past five years designed to reduce fiscal and criminal burdens those governments perceive as having been imposed by an influx of illegal aliens. Pet. at 7; Pet. App. at App. 66. The Third Circuit acknowledged that "a number of these laws contain provisions that are either identical, or similar, to provisions in Hazleton's ordinances." *Id.*

A recent law review article sought to identify local housing ordinances of this sort adopted by local governments during a three-year period from 2005 to 2008. The authors identified 13 such housing ordinances. Huyen Pham & Pham Hoang Van, *The Economic Impact of Local Immigration Regulation: An Empirical Analysis*, 32 CARDOZO L. REV. 485, 504 (2010). That total apparently does not include housing ordinances (such as Hazleton's) "that are the subject of litigation or that have been revoked." *Id.* at 492 n.21. Other jurisdictions have adopted similar housing ordinances in the years since 2008 or are considering doing so. *See, e.g., Keller v. City of Fremont*, No. 8:10CV270 (D. Neb.) (recently filed challenge to housing ordinance adopted in 2010 by Fremont, Nebraska).

Accordingly, a wide range of local governments have a strong interest in receiving guidance from the Court regarding whether housing ordinances such as Hazleton's are preempted by federal immigration law.

Yet, primarily because of the high costs of litigation, few local governments have been willing to follow Hazleton's path and defend their ordinances if sued by the American Civil Liberties Union. For example, after the ACLU in November 2006 filed a federal preemption challenge to the City of Escondido, California's housing ordinance and obtained a temporary restraining order, Escondido responded almost immediately by entering into a stipulated judgment whereby it was permanently enjoined from enforcing the ordinance. *Garrett v. City of Escondido*, No. 06-cv-2434 (S.D.Cal., Dec. 15, 2006) (Doc. No. 25).[10] Similarly, Valley Park, Missouri and Riverside, New Jersey repealed virtually identical housing ordinances after the ACLU filed suit against them.[11] *Riverside Coalition of Business Persons v. Township of Riverside*, No. 06-cv-05521 (D.N.J. 2006). News accounts indicate

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[10] The stipulation enables Escondido to re-adopt its ordinance should a higher court later determine that such housing ordinances are not preempted. *Id.* at Para. 3 ("This stipulated judgment is not an admission or finding of liability and shall not constitute a final determination on the merits of any issue.").

[11] Although Valley Park rescinded its housing ordinance, it decided to keep its ordinance that was designed to prevent the employment of illegal aliens. The federal courts ultimately upheld that employment ordinance, rejecting the ACLU's claim that it was preempted by federal immigration law. *Gray v. City of Valley Park*, 2008 U.S. Dist. LEXIS 7238 (E.D. Mo., Jan. 31, 2008), *aff'd*, 567 F.3d 976 (8th Cir. 2009).

that Riverside decided to repeal its ordinance in advance of any judicial ruling in large measure to avoid the high costs of litigation. *See* Ken Belson, "Towns Rethink Laws Against Illegal Immigrants," *New York Times* (Sept. 26, 2007).

In sum, although housing ordinances similar to Hazleton's have been adopted throughout the country, most legal challenges to those ordinances have not proceeded past the preliminary stage because most towns are unwilling to emulate Hazleton's commitment to spending large amounts of money in defense of their ordinances. Instead, other local governments have largely looked to this case for guidance on whether their laws are preempted. Indeed, Cherokee County, Georgia's official response to an ACLU challenge to its housing ordinance has been to look to this case for guidance. *See Robert Stewart, Inc. v. Cherokee County, Georgia*, No. 07-cv-0015 (N.D. Ga., Jan. 4, 2007) (consent order to preliminary injunction). The consent order explicitly stated: (1) "Cherokee County is amenable to avoiding any further expense for all parties associated with pursuing injunctive relief and is willing to consent to this Motion without making any admissions as to the validity of the Plaintiffs' claims"; and (2) "all proceedings in this case are stayed" pending resolution of the litigation challenging the Hazleton housing ordinances. *Id.* Unless the Court grants review, the *Robert Stewart* parties will never receive the definitive guidance they have been waiting four years to receive.

In sum, review is warranted in this case to provide the many local jurisdictions that have adopted

(or are contemplated adopting) housing ordinances similar to Hazleton's with the guidance they so desperately need, guidance that the Court is unlikely to be in a position to provide in connection with any other case in the foreseeable future.

CONCLUSION

Amici curiae request that the Court grant the petition for a writ of certiorari.

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(3)

No. 10-772

In the
Supreme Court of the United States

CITY OF HAZLETON, PENNSYLVANIA,
PETITIONER,

v.

PEDRO LOZANO, *ET AL.*,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Brief of the American Unity Legal Defense Fund As *Amicus Curiae* Supporting Petitioner

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QUESTIONS PRESENTED

1. Whether the provisions of a Hazleton, Pennsylvania, ordinance that encourage employers to utilize the federal E-Verify program to verify employees' work authorization and suspend the business licenses of those employers who have been found to have hired unauthorized aliens are impliedly preempted by federal immigration laws.

2. Whether the provisions of a Hazleton, Pennsylvania, ordinance that prohibit landlords from harboring illegal aliens by knowingly renting apartments to them are impliedly preempted by federal immigration laws.

3. Whether knowingly renting an apartment to an illegal alien constitutes harboring an illegal alien under 8 U.S.C. § 1324(a)(1)(A).

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STATEMENT OF INTEREST

Amicus curiae American Unity Legal Defense Fund ("AULDF") is a national non-profit educational organization dedicated to maintaining American national unity into the twenty-first century.[1] www.americanunity.org. AULDF has filed *amicus* briefs in recent cases, including *Chamber of Commerce v. Whiting*, No. 09-115, *argued* December 8, 2010, *Mohawk Industries v. Williams*, No. 05-465, *certiorari* dismissed as improvidently granted after argument, 547 U.S. 516 (2006), and *Horne v. Flores*, __ U.S. __, __ n. 10, 129 S.Ct. 2579, 2601 n. 10 (2009) (*citing* AULDF's *amici* brief).

AULDF supports the Petition and agrees with its reasons for granting the writ. AULDF writes separately to discuss the growing number of lower courts, like the Third Circuit here, which rely on an "equal balance" interpretation of congressional intent in the Immigration Reform and Control Act of 1986, even though this Court rejected that interpretation in *INS v. Nat'l Cen. for Immigrants' Rights*, 502 U.S. 183 (1991). The United States put AULDF's analysis of this Court's reversal at issue in a recent filing in the Ninth Circuit in *United States v. Arizona*, No. 10-16645 (9th Cir.), argued November 1, 2010, Docket 191; a copy of that filing is attached as an Appendix.

All parties to this case, through counsel, have consented to the filing of this brief. Copies of the consents have been filed with the Clerk.

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[1]Pursuant to Rule 37.6, *amicus* certifies that no counsel for a party authored this brief in whole or in part, and no such counsel, party or person other than the *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), *amicus* certifies that counsel of record for all parties received notice of its intention to file this brief more than ten days prior to its due date, and all counsel of record consented to the filing of this brief.

PRELIMINARY STATEMENT

> "The objective of this Act[2] was to stop illegal aliens from working, period."

Nat'l Ctr. for Immigrants' Rights, Inc. v. INS ("*NCIR*"), 913 F.2d 1350, 1375 (9th Cir. 1990) (Trott, J. dissenting), *rev'd*, 502 U.S. 183 (1991).

This case presents the preemption question not reached in *Chamber of Commerce v. Whiting*, No. 09-115, argued Dec. 8, 2010. The Ninth Circuit there[3] held that an Arizona law relating to the employment of illegal immigrants was neither expressly nor impliedly preempted by federal law. *Whiting* asks what constitutes "licensing and similar laws" under the savings clause in the express preemption provision of 8 U.S.C. § 1324a(h)(2).[4] The oral argument on December 8, in this context, discussed the scope of the savings clause and whether the Arizona law fit within that savings clause.

This case presents the next question: even if a state law is not expressly preempted because it is a "licensing or similar law," is it still conflict preempted because the 1986 IRCA permits only

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[2] The Immigration Reform and Control Act of 1986, Pub.L. No. 99-603, 100 Stat. 3359 (1986) ("IRCA").

[3] *Chicanos Por La Causa v. Napolitano*, 558 F.3d 856, 864-65 (9th Cir. 2009), *cert. granted*, *Chamber of Commerce v. Whiting*, 130 S.Ct. 3498 (2010), No. 09-115, argued Dec. 8, 2010.

[4] "The provisions of this section preempt any State or local law imposing civil or criminal sanctions (**other than through licensing and similar laws**) upon those who employ, or recruit or refer for a fee or other consideration for employment, unauthorized aliens." *Id.* (emphasis added).

"tempered" or "carefully balanced" federal administrative enforcement? *NCIR*, 913 F.2d at 1366.

Here, the Third Circuit found that the City of Hazleton ordinance in question is a licensing law within the express preemption savings clause. *Lozano v. City of Hazleton*, 620 F.3d 170, 208-09 (3rd Cir. 2010). The Third Circuit then said that the Hazleton ordinance was still subject to review for conflict preemption. 620 F.3d at 210, *citing*, *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 870-72 (2000). The Third Circuit held that the Hazleton ordinance's "employment provisions stand as an obstacle to the accomplishment and execution of federal law, and thus are pre-empted." 620 F.3d at 210.

The Third Circuit cited *NCIR* for the proposition that Congress had crafted a "careful balance" in IRCA. 620 F.3d at 211.

> Over the course of numerous sessions, Congress debated taking the theretofore unprecedented step of directly prohibiting the employment of "unauthorized aliens." Congress ultimately committed to enacting employer sanctions, but in so doing, **committed equally** to enacting measures that would protect groups likely to be unfairly burdened by those sanctions – employers and authorized workers. IRCA is thus "a carefully crafted political compromise which at every level balances specifically chosen measures discouraging illegal employment with measures to protect those who might be adversely affected."

Id. (footnote omitted; emphasis added).

This case asks whether the *NCIR* interpretation of IRCA can be revived (or was never

rejected) to preempt state and local laws which are not "committed equally" to, or "equally balanced" between, enforcement and other measures.

SUMMARY OF ARGUMENT

The "committed equally" or "equal balance" argument in favor of preemption of state and local laws which are too "enforcement-oriented" is a revival and expansion of the Ninth Circuit analysis in *NCIR*. In *NCIR*, this Court remanded an earlier finding that the immigration laws had only a "peripheral" interest in the employment of illegal immigrants so the Ninth Circuit could consider the effect of IRCA. A divided panel of the Ninth Circuit held that, even after IRCA, Congress did not feel that unauthorized employment presented such a danger to the country to justify "drastic" measures similar to those authorized under the Internal Security Act of 1950. The panel crafted the "balance" interpretation to justify its belief that Congress wanted only "tempered" enforcement.

Judge Trott dissented from the panel majority opinion in *NCIR*. He rejected the panel majority's analysis of IRCA, saying that Congress's objective in IRCA "was to stop illegal aliens from working, period." IRCA "fortified," not undercut, the traditional purpose of immigration laws to protect American workers.

This Court reviewed *NCIR*, looking in particular at the analysis of congressional intentions on enforcement to determine whether the panel majority's "tempered enforcement" or "balance" interpretation was consistent with congressional intent in IRCA. This Court unanimously reversed,

finding, as did Judge Trott, that the traditional protective purpose of the immigration laws was "forcefully" recognized in IRCA. There matters rested; no court cited the *NCIR* "balance" argument until the District Court here in 2007.

In the intervening years, however, federal enforcement of immigration laws in the workplace collapsed, leading several states to adopt measures to deal with the consequences. In response, litigants (including the United States) revived the "equal balance" interpretation and the reversed *NCIR* decision as a rationale for preemption.

Some courts have upheld some of these laws, rejecting the "equal balance" interpretations. *See, e.g., Chicanos Por La Causa*, 558 F.3d at 866-67. Others, using the "equal balance" theory, have struck down state laws which are judged too enforcement-oriented, as did the Third Circuit here, the Tenth Circuit in *Chamber of Commerce v. Edmondson*, 594 F.3d 742, 767 (10th Cir. 2010), and the District Court of Arizona in *United States v. Arizona*, 703 F.Supp.2d 980, 1001 (D.Ariz. 2010).

Using this reversed interpretation undermines traditional immigration law protections for American workers, exactly as this Court predicted in 1991, and at a time when federal law enforcement has collapsed and American workers most need protection.

There is no certainty that the Court will reach the "equal balance" theory in *Chamber of Commerce v. Whiting*. This Court should grant the Petition to clarify the viability of the "equal balance" theory.

In addition, some lower courts and litigants are citing this Court's reversal of *NCIR* as "rev'd on other grounds." Two weeks ago, for example, the U.S. Department of Justice told the Ninth Circuit that this

Court did not reverse the "equal balance" interpretation of IRCA in *NCIR*. This Court's reversal does not appear to have been "on other grounds." There is no caselaw discussing the appropriate use of this phrase, and the mis-citations may indicate a need to clarify the effect of this Court's opinions.

ADDITIONAL REASONS TO GRANT THE WRIT

I. THE "EQUAL BALANCE" THEORY CONFLICTS WITH DECISIONS OF THIS AND OTHER COURTS.

A. The "Equal Balance" Theory Originated in an Interpretation of IRCA as Having Only a "Peripheral Concern" About the Employment of Illegal Immigrants.

The "equal balance" interpretation of IRCA apparently originated in the Ninth Circuit's 1990 opinion in *NCIR*. 913 F.2d at 1366 ("a carefully crafted political compromise which at every level balances specifically chosen measures discouraging illegal employment with measures to protect those who might be adversely affected"), *quoted* at 620 F.3d at 211.

In an earlier decision in *NCIR*, the Ninth Circuit rejected a "no-work" bond condition for illegal immigrants released pending immigration proceedings because of the immigration laws' "peripheral concern ... with the employment of illegal aliens." 791 F.2d 1351, 1356 (9th Cir. 1986). This

Court vacated and remanded that decision for review in light of the newly-passed IRCA. *INS v. Nat'l Center for Immigrants' Rights, Inc.*, 499 U.S. 946 (1987).

On remand, the Ninth Circuit asked whether the Attorney General's regulations were founded on "considerations rationally related to the statute he is administering." 913 F.2d at 1360. To find this relationship, the Ninth Circuit said it would "examine employment as a focus of the INA, including the amendments put in place by IRCA, for its relevance to the question of detention and bond conditions." *NCIR*, 913 F.2d at 1358. The Ninth Circuit explained that it viewed the purpose of the rule as preventing the employment of illegal immigrants: "the administrative notice promulgating the rule stated explicitly that prevention of employment by illegal aliens and safeguarding of employment of United States citizens and permanent resident aliens was more important than increased detention costs." 913 F.2d at 1360.

The Ninth Circuit acknowledged that "Virtually every immigration act and amendment has dealt in some fashion with employment policy, and ... employment is an important concern of immigration law." 913 F.2d at 1364. It then reviewed IRCA to see if it "represented a Congressional finding regarding the dangers of unauthorized employment." 913 F.2d at 1366.

The Ninth Circuit compared IRCA to the Internal Security Act of 1950, 913 F.2d at 1360-61, and, citing *Carlson v. Landon*, 186 F.2d 183, 187 (9th Cir. 1950), *aff'd*, 342 U.S. 524 (1952), answered its own question in the negative: IRCA "states a **tempered enforcement policy** qualitatively different from the sweeping concerns with subversion

of the Internal Security Act." 913 F.2d at 1366 (emphasis added).

The Ninth Circuit then said "Congress did not consider unauthorized employment by individual aliens as the sort of danger to the nation addressed in ... the Internal Security Act." 913 F.2d at 1366-67. "While the INS argues that the authority to detain aliens is consistent with the goals and objectives of IRCA, the legislative history reveals otherwise. The regulation disrupts the **careful balance** which Congress achieved in IRCA." 913 F.2d at 1367-68 (emphasis added). "The emphasis on the rights of aliens as well as citizens shows a concern for fair and humane enforcement of the immigration laws which is at odds with the ... harsh and inhumane measures at issue here." 913 F.2d at 1369.

The Ninth Circuit concluded that "[u]nauthorized employment has never been held to justify detention, and IRCA made no findings of danger to the nation like the Congressional findings in the Internal Security Act." 913 F.2d at 1374. It struck the regulation as not rationally-related to the purposes of the INA after IRCA. *Id*.

This is the context in which the "equal balance" theory originated: "IRCA made no findings of danger to the nation" from "unauthorized employment," and thus enforcement provisions were to be "tempered" and "balanced" against other competing goals.

Ironically, the *NCIR* panel included Judge Stephen Trott, who had been Assistant Attorney General of the United States during the development of IRCA and Associate Attorney General during the

three years after passage.[5] Judge Trott rejected the panel majority position, describing the traditional purpose of the immigration laws as protecting American workers:

> An unmistakable purpose of the Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1101 *et seq.* ("INA") is to provide for the protection of American labor against an influx of aliens entering the United States for the purpose of performing skilled or unskilled labor where the economy of individual localities is not capable of absorbing them at the time they desire to enter this country. H.R. Rep. 1365, 82d Cong. 2d Sess. 51 (1957). As the Supreme Court observed in *Sure-Tan, Inc. v. NLRB,* "[a] primary purpose in restricting immigration is to preserve jobs for American workers." *Sure-Tan, Inc. v. NLRB,* 467 U.S. 883, 893 (1984).
>
> This purpose, if anything, was **fortified** by the Immigration Reform and Control Act of 1986, Pub.L. No. 99-603, 100 Stat. 3359 (1986) which reiterated the desire of Congress to erect at the borders barriers designed to protect U.S. citizens, and others here with lawful permission to work, from competition by illegal aliens not authorized by law to work in this country.

913 F.2d at 1374-75 (emphasis added).

Judge Trott also rejected the "balance" of purposes in IRCA. He summarized the congressional intent behind IRCA: "The objective of this Act was to

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[5] www.fjc.gov/servlet/nGetInfo?jid=2416&cid=999.

stop illegal aliens from working, period." 913 F.2d at 1375.

> The majority opinion's attempt to find something to the contrary in the IRCA's adoption of employer sanctions is thoroughly unpersuasive. In no way do the existence of employer sanctions suggest or imply that unauthorized work by illegal aliens is somehow acceptable. The choice of sanctions does not alter the **primary thrust** of the legislative scheme which is to deter and to prevent unauthorized employment. Unauthorized employment by illegal aliens remains illegal, and illegal aliens who are working without lawful authority are still expected to be stopped and to be calendared for removal from the country.

913 F.2d at 1375 (emphasis added).

Judge Trott's interpretation seems well-founded.[6] Congress did not commit "equally" to "preventing the hiring of unauthorized aliens, lessening the disruption of American business, and

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[6] "The major purpose of this bill is to make progress toward the day when the American people can be assured that the limitations and selection criteria contained in the immigration statutes are actually implemented through adequate enforcement." S. Rep. 99-132, at 3. "Unless illegal immigration is brought under control, I and many others, fear an increasing public intolerance - a lack of compassion if you will - to all forms of immigration - legal and illegal. It is this unwanted and wretched result that this bill today attempts to avoid." 131 CONG. REC. S7039 (May 23, 1985) (Statement of Sen. Simpson).

minimizing the possibility of employment discrimination."[7] 620 F.3d at 211.

The United States sought review of the Ninth Circuit's opinion, noting that "while IRCA constituted a carefully crafted compromise designed to take *new* steps to prevent illegal employment of aliens, the statute made no effort to modify existing provisions of the immigration laws, or to eliminate any steps available under those existing provisions to curb unlawful employment." Appellate Petition, *INS v. Nat'l Center for Immigrants' Rights,* No. 90-1090, 1991 WL 11009301, at 8 n. 8 (emphasis in original).

B. This Court Unanimously Reversed *NCIR* and Rejected the "Equal Balance" Interpretation of IRCA.

This Court accepted certiorari, limited to the question of whether the regulation was authorized by statute. 499 U.S. 496 (1991). In other words, which doctrine would control: the panel majority's "equal balance" interpretation that the statute permitted only "tempered enforcement" measures, or Judge Trott's "stop illegal aliens from working, period" interpretation?

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[7] In its "Purpose and Summary" of S. 1200, the Senate Judiciary Committee did not even mention these other "competing policy objectives." S. Rep. 99-132, at 1-2. The Senate Judiciary Committee summarized the bill's "Purpose" in one sentence: "The Committee bill is intended to increase control over illegal immigration." S. Rep. 99-132, at 1. The legislative history of IRCA and later laws in this regard is discussed in more detail in AULDF's *amicus* brief in *Chamber of Commerce v. Whiting*, No. 09-115, pp. 20-28.

This Court unanimously rejected the panel majority's interpretation, reversed and remanded the case. 502 U.S. at 188, 196.

This Court first recounted the history of the case, rejecting the original *NCIR* panel's characterization by saying that the passage of IRCA had "cast serious doubt on the Court of Appeals' conclusion that employment of undocumented aliens was only a 'peripheral concern' of the immigration laws." 502 U.S. at 187.

This Court then rejected the Ninth Circuit's interpretation of the disputed regulation as applying to all employment, and said it only affected "*unauthorized* employment." 502 U.S. at 189 (emphasis in original). This Court did not "consider whether the release of an alien who is authorized to work could be subjected to a 'no-work' condition." 502 U.S. at 191. "In this case, the Government's argument proceeds on the assumption that the 'Act as a whole' – including its concern with the employment of excludable aliens – should define the scope of the Attorney General's discretion." 502 U.S. at 193. In contrast:

> It is respondents who would excise employment from the statutory scheme, ... the contested regulation, when properly construed as applicable only to *unauthorized* employment, does not raise "constitutional doubts" and therefore does not militate in favor of a narrow construction of the organic statute.

502 U.S. at 193.

This Court rejected the Ninth Circuit's analogy to the Internal Security Act of 1950. 502 U.S. at 193 ("too cramped"). Instead, this Court noted that the:

> stated and actual purpose of no-work bond conditions was "to protect against the displacement of workers in the United States." ... We have often recognized that a primary purpose in restricting immigration is to preserve jobs for American workers.

502 U.S. at 194.

In a footnote, this Court rejected the panel majority's belief that IRCA permitted only a "tempered enforcement policy." This Court seemed to agree with Judge Trott that the purpose of IRCA "was to stop illegal aliens from working, period": "This policy of immigration was **forcefully** recognized most recently in the IRCA." 502 U.S. at 194, n. 8 (emphasis added). "The contested regulation is wholly consistent with this established concern of immigration law, and thus squarely within the scope of the Attorney General's statutory authority." 502 U.S. at 194.

This Court concluded: "The judgment of the Court of Appeals is therefore reversed and the case is remanded for further proceedings consistent with this opinion." 501 U.S. at 196.

C. In Response to Recent State and Local Licensing Laws, Some Lower Courts and Litigants Have Revived the "Equal Balance" Interpretation.

There the matter rested for sixteen years. No court raised the "equal balance" interpretation of IRCA until the District Court opinion in this case. *Lozano v. City of Hazleton*, 496 F.Supp.2d 477, 528 (M.D.Pa. 2007)("The two laws, however, strike a

different balance between these interests. The laws, therefore, conflict.").

In the meantime, however, Congress took other steps which were arguably inconsistent with the "tempered enforcement policy" or "equal balance" interpretation of congressional intent. For example, seeking more enforcement capability, Congress formalized the "287g" program to expressly promote state-federal cooperation in immigration law enforcement. 8 U.S.C. § 1357(g).

Congress also expanded 8 U.S.C. § 1324 to penalize directly (as opposed to being considered harboring) the hiring of more than ten illegal immigrants per year. 8 U.S.C. § 1324(a)(3)(A), Omnibus Consolidated Appropriations Act, 1997, Pub.L. 104-208, (1996), Div. C, Title II, § 203(b)(4).

In addition, Congress increased the penalties under § 1324 for employing illegal immigrants to include lengthy prison terms, and in some cases, possibly the death penalty. 8 U.S.C. § 1324(a)(1)(B).

Also in 1996, Congress amended the list of RICO[8] predicate crimes to include "any act which is indictable under the Immigration and Nationality Act, section 274 [8 U.S.C. § 1324] (relating to bringing in and harboring certain aliens) ... if the act ... was committed for the purpose of financial gain." 18 U.S.C. § 1961(1)(F).

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[8]The Organized Crime Control Act of 1970, Pub.L. 91-452, 84 Stat. 941, added Chapter 96 to Title 18 of the United States Code, entitled Racketeer Influenced and Corrupt Organizations ("RICO"). 18 U.S.C. §§ 1961-1968; *U.S. v. Turkette*, 452 U.S. 576, 577-78 (1981). Only certain predicate crimes trigger the application of RICO. 18 U.S.C. § 1961(1).

"Competing objectives," such as lessening the burden on business and preventing discrimination, were not the purpose of these changes. For example, use of 8 U.S.C. § 1324 (instead of "employer sanctions" under § 1324a) subjects employers to liability for hiring illegal immigrants without any "balance" against burden or anti-discrimination rules.[9] Similarly, the addition of RICO liability exposes employers of illegal immigrants to state-level RICO suits. *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990); *Williams v. Mohawk Industries*, 465 F.3d 1277, 1293-94 (11th Cir. 2006), *cert. denied*, 127 S.Ct. 1381, 167 L.Ed.2d 174 (2007).

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[9] *Edwards v. Prime, Inc.*, 602 F.3d 1276, 1299 (11th Cir. 2010) ("We tend to agree with the Second Circuit that the revision history of § 1324(a)(1)(A)(iii) strongly indicates that one who hires an alien knowing or recklessly disregarding his illegal status is guilty of concealing, harboring, or shielding from detection."); *U.S. v. Kim*, 193 F.3d 567, 573 (2nd Cir., 1999) ("the evolution of § 1324(a)(i)(A)(iii) to its present form makes clear that Congress intended it to cover employers . . . The fact that employers are also targeted by § 1324a provides no support for Kim's contention that he should have been prosecuted under § 1324a."); *U.S. v. Ye*, 588 F.3d 411 (7th Cir. 2009). As the Eleventh Circuit noted in *U.S. v. Zheng*, 306 F.3d 1080, 1087 (11th Cir., 2002):

> The legislative history demonstrates that Congress intended § 1324 to cover employers such as the Appellees. Congress expressly noted the pervasive problem of illegal alien employment and its harmful effect on the American worker. Each time an employer hires an illegal alien, an American citizen loses an employment opportunity. Congress understood this problem and chose to penalize employers for hiring illegal aliens and harboring them from detection by providing transportation and housing for them.

Nor could the imposition of the death penalty for hiring illegal immigrants be considered "tempered enforcement." 8 U.S.C. § 1324(a)(1)(B). Some might consider it "harsh," rather than "fair and humane enforcement of the immigration laws." *NCIR*, 913 F.2d at 1369. Even if the Ninth Circuit had fairly summarized congressional intentions in IRCA (which this Court held it did not), its *NCIR* assessment is no longer accurate.

For a time after the 1986 enactment of IRCA, the federal enforcing agencies seemed to abide by the statutory priorities. A 1991 Immigration & Naturalization Service memorandum ordered an enhanced worksite enforcement initiative: "The message to employers must be unequivocal – INS is prepared to vigorously enforce administrative and criminal sanctions against those who violate the law."[10] In 1995, President Clinton issued "a memorandum which identified worksite enforcement and employer sanctions as a major component of the Administration's overall strategy to deter illegal immigration."[11]

By 1996, there appeared to be a breakthrough: INS developed "Operation Vanguard," a new "efficient and effective" interior enforcement strategy – auditing employment verification forms required by employer sanctions. CRS, *Immigration Enforcement*, at 38-39 ("[Operation] Vanguard demonstrated an efficient and effective capability to bar unauthorized workers from employment in any given sector.").

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[10] Congressional Research Service ("CRS"), *Immigration Enforcement Within the United States*, April 6, 2006, CRS RL 33351 ("*Immigration Enforcement*"), at 37.

[11] *Id.*

In 1998, however, INS abandoned the "effective" strategy of "Operation Vanguard" *because* it was effective. "When the capability was realized, it was stopped." CRS, *Immigration Enforcement*, at 39; *see, also, id.*, at 61-62 (describing May 1998 INS "Immediate Action Directive for Worksite Enforcement Operations" ordering a cutoff of worksite enforcement). INS abandoned the "effective" policy because of "complaints," *id.* at 38, 62, not because Congress changed the law.

As a result, the reality of worksite immigration enforcement was substantially different from Congress's intention: "Since fiscal year 1999, the number of notices of intent to fine issued to employers for violations of IRCA [8 U.S.C. § 1324a] and the number of administrative worksite arrests have **declined**. . ."[12]

GAO's bland language masks the true extent of the "decline." Between 1996 and 2005, workplace arrests for violations of the prohibitions on hiring illegal immigrants "declined" 99.1%, and penalties to employers "declined" 99.7%.[13] The figures have not rebounded since.[14]

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[12] U.S. Government Accountability Office ("GAO"), *Immigration Enforcement: Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts*, ("*Immigration Enforcement Weaknesses*"), August 2005, GAO-05-813, at 30 (emphasis added).

[13] Sources: 1997-98 data: U.S. Dept. of Homeland Security, *2003 Yearbook of Immigration Statistics*, Sept. 2004, Table 39. 1999-2005 data: GAO, *Immigration Enforcement Weaknesses*, 35, 36, Figures 4 and 5. *See*, AULDF's *amicus curiae* brief in *Chamber of Commerce v. Whiting*, No. 09-115, pp. 31-34.

[14] *Id.*

Thus, there is, effectively, no interior immigration law enforcement for the vast majority of illegal immigrants in the United States. ICE, the agency entrusted with enforcing the law, enforces it only against terrorists and aliens who have been convicted of serious crimes. If other illegal immigrants are apprehended, they are to be released, not deported.

The effect of this enforcement collapse falls most heavily on low-income and young American workers:

> Employment of illegal aliens in times of high unemployment deprives citizens and legally admitted aliens of jobs; acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions. These local problems are particularly acute in California in light of the significant influx into that State of illegal aliens from neighboring Mexico.

De Canas v. Bica, 424 U.S. 351, 356-57 (1976).

Absent clear congressional ouster, states have the authority to act to prevent these "local problems." *Id.* As a result of the collapse of interior law enforcement, several state and local governments have attempted to protect their own interests. *See, e.g.*, Pet. at 7.

In response to these new laws, litigants have cited the *NCIR* "equal balance" interpretation of IRCA. In *Chamber of Commerce v. Whiting*, No. 09-115, argued December 8, 2010, for example, the

Petitioners rely on the "equal balance" argument to argue an implied preemption case. Petitioner's Br. in No. 09-115, at 37-47. "Finally, Arizona's unauthorized worker regime disrupts the balance that Congress struck among its various policy objectives." *Id.*, at 42. The Arizona law at issue in that case "disrupt[s] the careful balance struck by Congress." Petitioner's Reply Br. in No. 09-115, at 13, 17-20.

Even the United States has asserted the "equal balance" argument for preemption. "[T]he Arizona statute is impliedly preempted because it upsets the careful balance that IRCA established." Brief for the United States as *Amicus Curiae*, in No. 09-115, at 9.

In *United States v. Arizona*, now on appeal to the Ninth Circuit, the United States expressly denied that this Court reviewed or rejected the *NCIR* "balance" interpretation. *See*, F.R.A.P. Rule 28(j) letter of December 17, 2010 in *United States v. Arizona*, No. 10-16645 (9th Cir.), Doc. 191, *reprinted* in Appendix to this Brief at App. 3 ("the Supreme Court's opinion is fully consistent with this Court's analysis of IRCA's legislative history.").

Some courts, hearing these challenges, have upheld some of these laws, rejecting the "equal balance" interpretations. *See, e.g., Chicanos Por La Causa*, 558 F.3d at 866-67; *Gray v. City of Valley Park, Mo.*, 2008 WL 294294 (E.D.Mo. Jan 31, 2008) (No. 4:07CV00881 ERW), *19 ("the emphasis on preventing the hiring of illegal aliens is a goal shared by the Federal and local law").[15] One district court

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[15] Although the District Court in *Valley Park* ruled on the preemption question, the only questions appealed were standing and preclusion, on which the Eighth Circuit affirmed.

found a local ordinance preempted as a regulation of immigration and an obstacle to uniform application of federal law, but without discussing the "equal balance" theory. *Villas at Parkside Partners v. City of Farmers Branch, Tex.*, 701 F.Supp.2d 835 (N.D.Tex., 2010).

Other courts, using the "equal balance" theory, have struck down state laws as too enforcement-oriented, as did the Third Circuit here, the Tenth Circuit in *Edmondson*, 594 F.3d at 767, and the District Court of Arizona in *United States v. Arizona*, 703 F.Supp.2d at 1001.

In *Edmondson*, for example, the Tenth Circuit upheld a preliminary injunction against a state law requiring use of the federal immigration verification database at issue in this case because, *inter alia*, it felt that the plaintiffs could demonstrate a likelihood of success in demonstrating that the state law was preempted. 594 F.3d at 771. "IRCA thus embodies a carefully considered balance of various competing objectives." 594 F.3d at 767-68. "We conclude that Section 9 similarly upsets Congress' carefully constructed balance by interfering with its chosen methods." 594 F.3d at 769.

The District Court for Arizona also relied on *NCIR* to enjoin, on preemption grounds, portions of a state law similar to that at issue here. *United States v. Arizona*, 703 F.Supp.2d at 1001.

These are just the beginning. The expansion of claims under the "equal balance" interpretation threatens an unending flood of cases claiming that particular enforcement measures are not "tempered"

Gray v. City of Valley Park, Mo., 567 F.3d 976, 980 (8th Cir. 2009).

enough, or disturb some imagined "balance." Pet. at 22-24.

The resurrection of the "equal balance" interpretation of IRCA may do what this Court predicted in reversing *NCIR*: undermine traditional protections for American workers, in contradiction to decades of settled immigration precedents. There is no reason to revive an interpretation so soundly rejected by this Court in 1991.

This Court should grant the writ to review the Third Circuit's use of the "equal balance" interpretation of IRCA.

II. SOME COURTS AND LITIGANTS MISTAKENLY CITE THIS COURT'S *NCIR* REVERSAL AS "ON OTHER GROUNDS," SUGGESTING A NEED FOR CLARIFICATION.

As noted above, this Court's 1991 opinion seemed to reject the *NCIR* panel majority's "equal balance/tempered enforcement" interpretation of IRCA, and support Judge Trott's "stop illegal aliens from working, period" interpretation. Several courts, including the Third Circuit below, however, have characterized the *NCIR* reversal as "on other grounds", meaning on grounds other than the "equal balance" interpretation. *Lozano*, 620 F.3d at 211; *Edmondson*, 594 F.3d at 771; *United States v. Arizona*, 703 F.Supp.2d at 1001.

It is unclear why the reversal is being so characterized. The reversal was not expressly conditioned or limited. The dichotomy between the *NCIR* panel majority's interpretation and Judge Trott's was readily apparent, and contained within

both the Question Presented and the Court's discussion. The reversal opinion of this Court mentions the page numbers of the "balance" analysis, accurately and completely characterizes that analysis, rejects the case interpretations on which the analysis rests, and concludes by echoing Judge Trott in reasserting the primacy of the purpose of the immigration laws to protect American workers.

In contrast, for example, in *City of Valley Park, Mo.*, the District Court found that an ordinance similar to the Hazleton ordinance struck down here was not preempted. 567 F.3d at 980. That finding was not appealed to the Eighth Circuit. The Eighth Circuit expressly stated the lower court's preemption finding and ruled only on standing and preclusion, thus leaving in place the preemption finding (which conflicts with the Third Circuit's analysis here).

Nor do more recent Ninth Circuit opinions defer to the reversed *NCIR* opinion, although the Ninth Circuit's law of the circuit doctrine would otherwise require following the *NCIR* interpretation if it were still operative. *United States v. Washington*, 593 F.3d 790, 798 n. 9 (9th Cir. 2010). In *Chicanos Por La Causa*, 558 F.3d at 864-65, for example, the unanimous Ninth Circuit opinion cites only to this Court's opinion reversing *NCIR*.

Similarly, in an unreported memorandum decision this year, another panel[16] of the Ninth

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[16] The *We Are America* panel included Judges Kozinski and Ikuta, who also sat on the panel in *Gonzalez v. Arizona*, 624 F.3d 1162 (9th Cir. 2010), *pet'n for reh'g en banc filed* November 16, 2010, Nos. 08-17094, 08-17115. The *Gonzalez* decision, which found preemption of an Arizona voter identification law on

Circuit did not rely on the *NCIR* "tempered enforcement policy" or "equal balance" interpretation when it said: "Arizona has an important interest in enforcing its criminal statutes, and it's not 'readily apparent' that federal law preempts Ariz.Rev.Stat. § 13-2319 or Maricopa County's enforcement policy." *We Are America/Somos America Coalition of Maricopa County v. Maricopa County Bd of Supervisors*, 386 Fed.Appx 726 (9th Cir. 2010). In *We Are America*, the Ninth Circuit reviewed a District Court finding that federal law did not preempt an Arizona law criminalizing alien smuggling. The District Court found that the Arizona law was harmonious with federal law. 594 F.Supp.2d 1104, 1110-14 (D.Ariz. 2009). The *We Are America* District Court distinguished the conflict preemption finding of the District Court here, 594 F.Supp.2d at 1113-14, but held that it should abstain from deciding the issue. 594 F.Supp.2d at 1116. The Ninth Circuit affirmed the abstention analysis, but remanded to review standing. 386 Fed.Appx 726.

In other words, this Court's holding in *NCIR* does not seem like a reversal "on other grounds" and is not being treated as such even by the Ninth Circuit. It appears to be a complete reversal of the entire Ninth Circuit opinion, including the "equal balance" interpretation. The reversal supports Judge Trott's "stop illegal aliens from working, period" interpretation of IRCA.

There appears to be no controlling caselaw governing the use of the phrase "reversed on other grounds." *Taxier v. Sweet*, 2 U.S. 81 (1766)(Court

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Elections Clause grounds, includes an extensive discussion of the Ninth Circuit's law of the circuit doctrine.

equally divided on whether reversal equivalent to vacatur). This is not a case where the appeal became moot because of happenstance or action by the prevailing party. *U.S. Bancorp Mortg. Corp. v. Bonner Mall Partnership*, 513 U.S. 18, 22-28 (1994).

Nor is this a case where the remand was intended to let the *NCIR* panel revisit the same issue, *Duke Power Co. v. Greenwood County, S.C.*, 299 U.S. 259, 268 (1936). The Ninth Circuit had two attempts to analyze the immigration laws, and this Court rejected its analysis each time. 502 U.S. at 187, 196. Thus, where a vacatur would "clear[] the path for future relitigation," *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997), *quoting United States v. Munsingwear*, 340 U.S. 36, 40 (1950), here there seems no indication that this Court wanted this issue relitigated; there is every indication that this Court considered the matter settled.

The Third Circuit's (and other courts' and litigants') citation of the reversed *NCIR* opinion "may have been the result of a desire to show approval of the reasoning." *Great Western Sugar Co. v. Nelson*, 442 U.S. 92, 94 (1979). That "desire" does not excuse ignoring this Court's "teaching." *Id.* And thus the citation should not include a misleading explanatory signal intended to give more weight to the "desire."

Since this citation of the reversal as "on other grounds" has appeared in different courts across the country, and the United States has recently told the Ninth Circuit that it denies the reversal of the IRCA interpretation, *see* App. 3, it appears that some clarification of the nature of the reversal in *NCIR* is appropriate. Otherwise, litigants will continue to make this mischaracterization and courts will continue to rely on the reversed decision.

This Court should grant the writ to review the lower courts' use of the reversed *NCIR* decision, and to give direction as to whether there is any appropriate use.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* respectfully requests this Court to grant the Petition and review the decision below.

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December 30, 2010

APPENDIX

F.R.A.P. Rule 28(j) Letter from U.S. Department of Justice in *United States of America v. Arizona*, No. 10-16645 (9th Cir.), Doc. 191.

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December 17, 2010

VIA CM/ECF

Ms. Molly C. Dwyer
Clerk, United States Court of Appeals
for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Re: *United States of America v. Arizona*, No. 10-16645 (9th Cir.)
Argued November 1, 2010 before Judges Noonan, Paez, and Bea

Dear Ms. Dwyer:

Pursuant to F.R.A.P. 28(j), the United States hereby responds to the November 24, 2010, letter filed by Amicus Curiae American Unity Legal Defense Fund. Amicus belatedly and incorrectly suggests that the Supreme Court disapproved this Court's analysis

of IRCA's legislative history in *National Center for Immigrants' Rights v. INS*, 913 F.2d 1350, 1367-69 (9th Cir. 1990), when it reversed this Court's holding on grounds unrelated to that analysis. This Court determined that "[w]hile Congress initially discussed the merits of fining, detaining or adopting criminal sanctions against the *employee*" for working without authorization, "it ultimately rejected all such proposals." *Id.* at 1368. The Supreme Court cast no doubt on that observation. Instead, the Supreme Court disagreed with this Court's construction of the regulation and statute at issue in that case, neither of which is relevant here. *See INS v. Nat'l Ctr. for Immigrants' Rights*, 502 U.S. 183 (1991). The Supreme Court also described this Court's reliance on cases construing the Attorney General's detention authority as "misplaced" and "too cramped." *See id.* at 193 (citing *United States v. Witkovich*, 353 U.S. 194 (1957); *Carlson v. Landon*, 342 U.S. 524 (1952)). That conclusion likewise has no bearing on this Court's analysis of IRCA.

The Supreme Court's observation that immigration restrictions have been designed in part to "preserve jobs for American workers," *id.* at 194 (internal quotation marks omitted), echoes this Court's observation that Congress sought to address "serious problems associated with illegal employment, including loss of jobs for low-income Americans," 913 F.2d at 1367. It in no way calls into question this Court's conclusion about the means Congress chose to address that problem.

Amicus notes that *before* the passage of IRCA this Court had characterized the INA's concern with employment as "peripheral." *See INS*, 502 U.S. at 186-87 (quoting *Nat'l Ctr. for Immigrants' Rights*,

Inc. v. INS, 791 F.2d 1351, 1356 (9th Cir. 1986)). That prior characterization has no bearing on this Court's subsequent analysis of IRCA's legislative history.

In short, the Supreme Court's opinion is fully consistent with this Court's analysis of IRCA's legislative history.

Sincerely,

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